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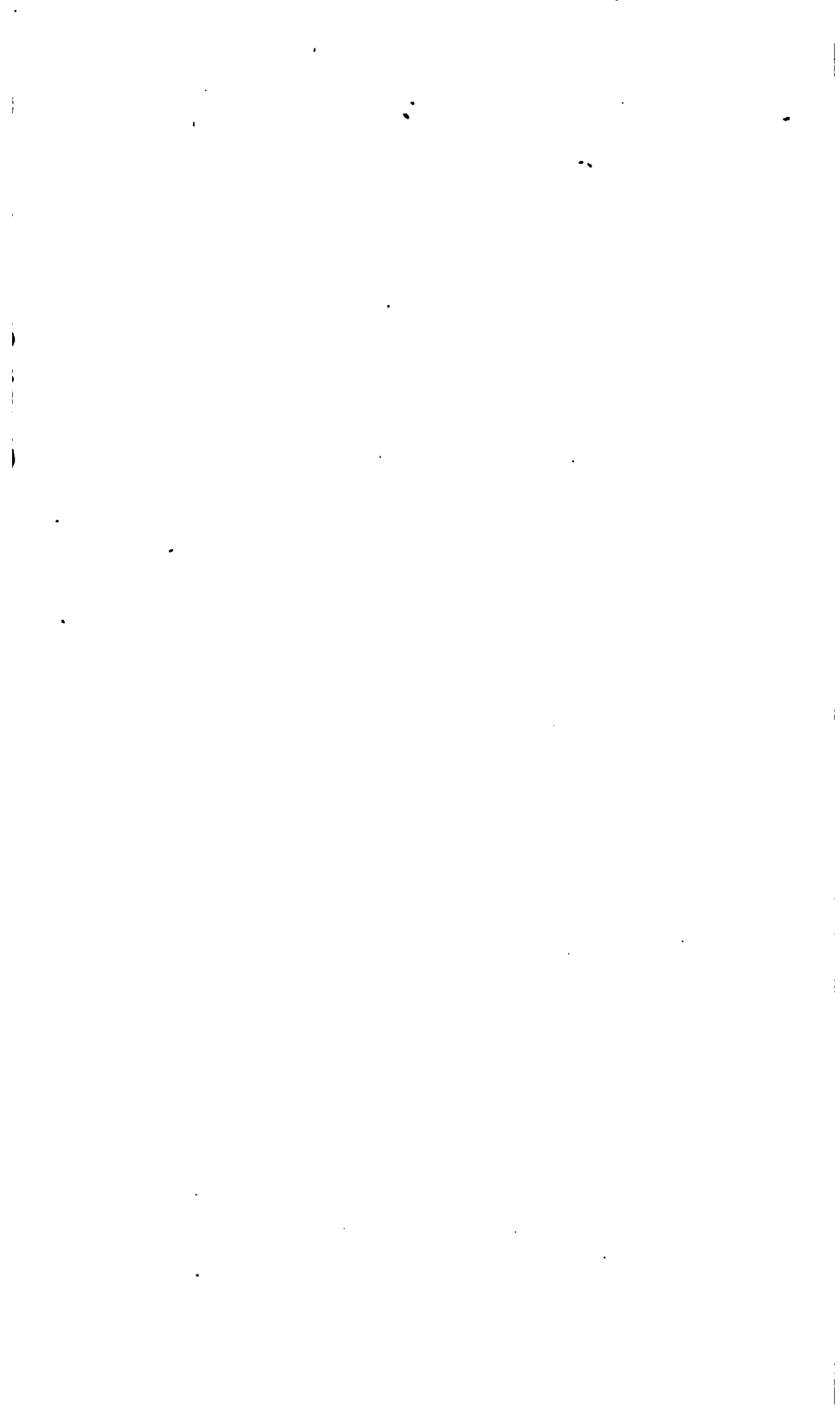
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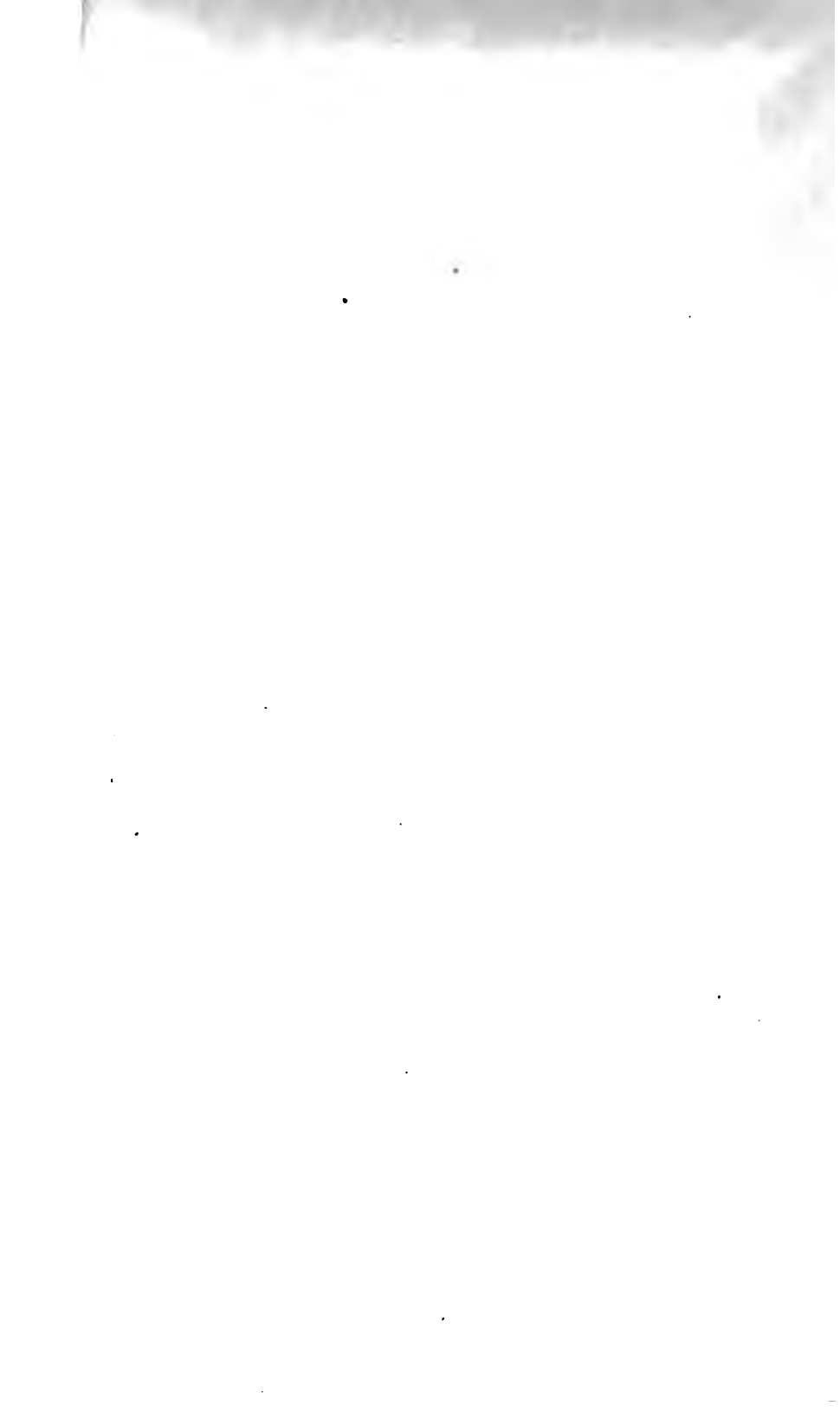
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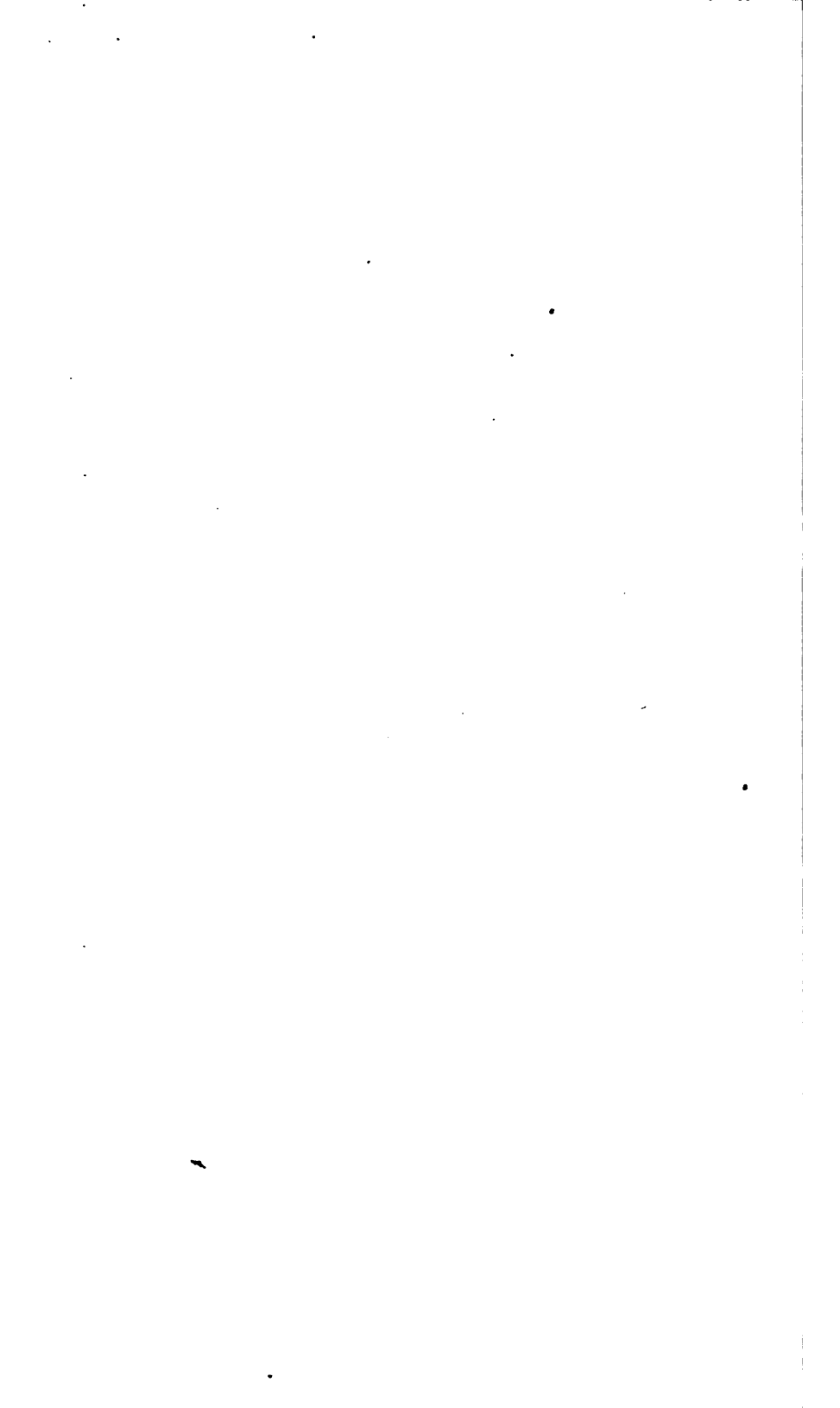
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THE
AMERICAN STATE REPORTS,

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

**SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN
DECISIONS" AND THE "AMERICAN REPORTS,"**

DECIDED IN THE

COURTS OF LAST RESORT

OF THE SEVERAL STATES.

SELECTED, REPORTED, AND ANNOTATED

By A. C. FREEMAN,
AND THE ASSOCIATE EDITORS OF THE "AMERICAN DECISIONS."

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AMERICAN STATE REPORTS.
VOL. LVIII.



CASES
IN THE
SUPREME COURT
OF
WASHINGTON.

OWEN v. HENDERSON.

[16 WASHINGTON, 39.]

A CONVEYANCE OF THE WEST HALF OF A LOT INCLUDES the west half in quantity and not merely the part lying westerly of a line drawn north and south midway between, and parallel to, the side lines of the lot.

DEEDS.—PAROL EVIDENCE TO EXPLAIN A DEED is not admissible where, without such evidence, its meaning is clear. Hence, the effect of a conveyance of the west half of a lot of land cannot be modified by evidence of the understanding of the parties as shown by prior conveyances and by their testimony at the trial.

H. E. Shields and John K. Brown, for the appellant.

Arthur & Wheeler and James B. Dowd, for the respondents.

⁴¹ **GORDON, J.** Respondents brought this action to recover the balance alleged to be due on a written contract entered into between the parties on the 13th of December, 1892, by the terms of which the respondents agreed to sell and the appellant to buy certain ⁴² premises described as lots 16, 17, 18, and 19, in the town of Charleston, Kitsap county, for the sum of thirteen hundred dollars, of which one hundred dollars was paid down at the time of entering into the contract, five hundred dollars was paid on the 15th of December, 1892, and the balance was to be paid on or before December 12, 1893.

The complaint alleges that on said last-mentioned day a tender was made of a good and sufficient deed of conveyance, and a demand upon appellant for the payment of the balance of the purchase price.

The answer admits the making of the contract and payment of six hundred dollars on account thereof, and for defense and counterclaim alleges a want of title in the plaintiffs (respondents) on December 12, 1893; that on that day, namely, December 12, 1893, defendant (appellant) tendered to plaintiffs the amount remaining due under the terms of the agreement, and demanded a deed conveying to defendant a good title to the premises in fee simple; and that thereafter, on the second day of January, 1894, defendant elected to rescind on account of the plaintiff's failure to comply with the terms of the written contract; that thereupon defendant notified respondents of such rescission and demanded from them the repayment of the sum of six hundred dollars theretofore paid. The case was tried by the court without a jury, and findings of fact and conclusions of law duly made, upon which judgment was entered in favor of the plaintiffs, and defendant has appealed.

Among other things the court found that on December 12, 1893, plaintiffs tendered to defendant "a good and sufficient deed of conveyance of said real property. . . . That at the time said tender was made, and at all times mentioned herein, the plaintiffs owned said real estate and had a right to convey ⁴³ the same." This finding was excepted to and is assigned as error. The record discloses that the premises embraced in the contract of sale between the parties are located in lot 1, section 22, township 24 north, range 1 east, W. M. This lot was owned on August 11, 1890, by W. H. Braden, M. L. Beets, and R. C. Bott, who on that day conveyed to O. A. Boulette the "west half" of lot 1, section 22, township 24 north, range 1 east, W. M., according to the government survey, containing twenty acres more or less. It is the claim of the appellant that the grant of the "west half" conveyed to Boulett the west half in quantity, and not the part lying westerly of a line drawn north and south midway between, and parallel to, the side lines of said lot. The lot is the fraction of a forty-acre subdivision, a portion of the southeast corner being cut off by the bay. Boulette platted the town of Charleston on the west half of said lot only, and the premises concerning which this litigation arises lie on the easterly margin of the plat, and, if appellant's contention as to the effect of the deed to Boulette is correct, the eastern portion of the premises described in the complaint do not lie within the grant to Boulette, and the plaintiffs had no title to that portion of the premises on the 12th of December, 1893; so that the sole question is, whether a deed conveying the "west half" of a fractional lot,

which lot contains less than a legal subdivision of forty acres, conveys an equal half of the lot in area. We think it must be answered affirmatively, and that appellant must prevail.

In *Hartford Iron Min. Co. v. Cambria Min. Co.*, 80 Mich. 491, the court say: "The literal significance of the word 'half' is one of two equal parts into which anything may be ⁴⁴ divided. . . . It must be held that the true boundary line between these two pieces of land is by a line, drawn north and south, dividing the lands into equal acreage."

Counsel for respondents strenuously insist that the question involved, being one of boundary, is to be determined by ascertaining the intention of the parties to certain conveyances made prior to the execution of the contract between the parties to this action, and further contend that the prior conveyances and the understanding of the parties thereto as ascertained from their testimony upon the trial, are sufficient to show that there were twenty acres in the tract known as the "west half."

We think that no proper case was presented calling for the introduction of parol evidence as to the intention of the parties. No ambiguity is apparent upon the face of the deed.

"There should be interpretation only, when it is needed—that is only where, without it, the meaning or effect of the contract would be in doubt": *Hartford Iron Min. Co. v. Cambria Min. Co.*, 80 Mich. 491. See, also, *Dart v. Barbour*, 32 Mich. 267; *Harris v. Oakley*, 130 N. Y. 1.

In the contract between the parties, it is expressly stipulated that time was of the essence thereof, and it satisfactorily appearing that the defect in plaintiff's title was not remedied prior to the time when defendant elected to rescind, it follows that judgment should have been entered for defendant for the amount which she had paid upon the purchase price, together with legal interest thereon from the dates of such payments. She was entitled to a marketable title, and could not be required to accept less in quantity than what she had agreed to purchase and pay for. Under the wording ⁴⁵ of this contract, she was entitled to withdraw from its provisions and demand a return of the money theretofore paid by her upon it, at any time after the expiration of the time fixed by the contract for plaintiffs to perform their part, and before such actual performance.

The judgment will be reversed and the cause remanded for further proceedings in accordance herewith.

Hoyt, C. J., and Anders and Dunbar, JJ., concur.

DEEDS—CONSTRUCTION—DESCRIPTION OF LANDS CONVEYED.—Description of land as "south part of section 5, township 14, range 4 east, two hundred and twenty-five acres," is not void for uncertainty. The lands will be located by laying off two hundred and twenty-five acres, having the southeast and west sides of the section for boundaries, and the remaining boundary is parallel to the south line of the section, and sufficiently distant therefrom to include the requisite quantity: *Tierny v. Brown*, 65 Miss. 563; 7 Am. St. Rep. 679; *Minneapolis etc. Ry. Co. v. Cox*, 76 Iowa, 306; 14 Am. St. Rep. 216, and note.

DEEDS—PROPERTY CONVEYED—PAROL EVIDENCE TO IDENTIFY.—Evidence of extrinsic facts and circumstances is admissible to identify premises sold, or to apply the description thereto, but a fatally defective description in a sale on execution cannot be helped out by evidence of facts tending to prove what property was intended to be advertised and sold: *Herrick v. Morrill*, 37 Minn. 250; 5 Am. St. Rep. 841; *Hooten v. Comerford*, 152 Mass. 591; 23 Am. St. Rep. 861; *Lego v. Medley*, 79 Wis. 211; 24 Am. St. Rep. 706, and note.

MOORE v. GILMORE.

[16 WASHINGTON, 123.]

GARNISHMENT OF JOINT DEBT.—Under a writ of execution or attachment against one defendant, his interest in a debt due jointly to himself and another may be garnished.

GARNISHMENT OF JOINT DEBT, PARTIES ESSENTIAL TO.—If it is sought to garnish the interest of a debtor in a debt due to himself and others, the other persons interested with him should be made parties to the proceeding, to the end that the defendant's interest in the joint debt may be ascertained and that the proceedings may not result to the prejudice of the co-owners with him of the debt. Under a statute providing that a court, if a complete determination of a controversy cannot be had without prejudice to the rights of persons not before it, shall cause them to be brought in, the court may, in garnishment proceedings, bring before it persons who are jointly interested with the defendant in the debt sought to be garnished.

JURISDICTION, METHOD OF ACQUIRING OVER PERSONS NOT PARTIES TO GARNISHMENT PROCEEDINGS.—Under a section of the code providing that when jurisdiction is given to a court, all means to carry it into effect are also given, and where the mode of proceeding is not specifically pointed out, authorizing the court to adopt any process or proceeding which may appear most conformable to the spirit of the code, the court may issue suitable process or notice requiring persons who claim to be interested jointly with a debtor in a debt due him and them, which is sought to be garnished, to appear before it for the purpose of having the defendant's interest in such joint debt determined.

Boyer & Guic and Greene, Turner & Lewis, for the appellants.

Ira Bronson, for the respondents.

123 SCOTT, J. The plaintiffs brought suit upon a promissory note and obtained judgment against the defendant Gilmore. While the action was pending, and a few days prior to the rendi-

tion of the judgment, they caused a writ of garnishment to be issued and served on the other parties respondent. The garnishees appeared and answered, but did not disclose any liability to the principal defendant. Plaintiffs controverted the answers, and, a jury being waived, the issue came on for trial before the court. The facts showed that some of the garnishees were indebted to Gilmore and one Kirkman as joint claimants; that Kirkman was dead; ¹²⁴ that after his death Gilmore and Kirkman's executors brought suit on said claim against said garnishees and obtained judgment; that thereafter the plaintiffs brought suit on a bond given, in said action last hereinbefore mentioned, to the plaintiffs, by all of the garnishees, and obtained a judgment against all of them; and that none of the judgments had been paid. On these facts the court discharged the garnishees, and the plaintiffs have appealed.

The question is presented whether, upon a claim against one party, garnishees can be held upon a debt owed such party and another person jointly. The authorities are in conflict upon this point. A number of cases have been cited by the appellants, holding that a joint claim may be reached for the individual debt of one of the joint claimants, and some of the text-books are to that effect: *Whitney v. Munroe*, 19 Me. 42; 36 Am. Dec. 732; *Thorndike v. De Wolf*, 6 Pick. 119; *Miller v. Richardson*, 1 Mo. 310; *Fogleman v. Shively*, 4 Ind. App. 197; 51 Am. St. Rep. 213; *Perry v. Blatch*, 2 Kan. App. 522; *Drake on Attachments*, secs. 566-72; 8 Am. & Eng. Ency. of Law, 1169.

There are other cases and text-books, cited by the respondents, holding to the contrary, and a number of cases have been cited by both parties relating to the garnishment of debts due a partnership on a claim against one of the partners. A distinction is drawn in the authorities between debts due joint claimants and those due to a partnership, and in some states, where it is held that joint claims may be reached upon a debt against one joint claimant, it is held that the interest of a single partner in a partnership claim cannot be so reached. The reasons for this usually given are that a partner has no separable interest in any specific partnership property, and that such property ¹²⁵ is first liable for partnership debts, and to such claims as may be due the other partners owing by the partner proceeded against, and that the effect of this is to so involve the proceedings as to render the remedy impracticable of enforcement. If there were no such debts, however, it would seem that this reason ought not to prevail, but with that question we have not to deal in this case.

We shall not undertake to review the authorities cited in detail,

but we have examined them and are of the opinion that the better sustained rule is, that a joint claim may be reached by garnishment to the extent of one of the claimant's interests therein to satisfy his individual debt. The reasons given in those cases holding that a joint debt may not be so reached are not always satisfactory or tenable. A very general one given is, that the garnishing creditor can have no greater rights or privileges than the principal defendant or primary creditor of the garnishee. Another one is that the demand cannot be severed and thus subject the garnishee to the liability of several suits. Also, that the other joint claimant is an interested party and entitled to half the moneys collected.

Aside from the question that the garnishing creditor may always inquire into fraudulent transactions between the principal defendant and the garnishee for the purpose of placing such defendant's property beyond the reach of his creditors, the law is well settled that a single claim against one party may be severed to the extent of taking only sufficient of it to satisfy the demands of the garnishing creditor. The fact that the garnishee may be authorized to pay the whole demand to the officer, or to turn over the whole property to him, as the case may be, can have no bearing on this, for it might not always be allowable, at his option, ¹²⁶ as in a case where he should be under two garnishments from different courts to recover different claims against the principal defendant. If the law will thus sever a single demand owing by the garnishee to the principal defendant solely, it would seem that the only reason for holding that the garnishee cannot be held to answer for the debt of one, where he owes two or more jointly, would be in consequence of a failure in the law to provide for the protection of the interests of the other joint claimants and the garnishee as against them; and, if such protection is given, the difficulty is obviated.

As the right of garnishment is a statutory one, it is probable that the conflict in the authorities is due in a measure to a difference in the statutory provisions of the several states upon the subject of garnishment. The tendency of legislation, in this state at least, has been to extend rather than curtail the right. The general purpose of the law is to subject all property of the debtor, over and above his exemptions, to the payment of his debts. Where the right of garnishment is given it would seem that the question as to whether it would be available in a particular case would be dependent upon two matters: these are, that the remedy should be capable of enforcement, and a due protection given to the rights of third parties who thus become

unwillingly involved in such controversies between a creditor and his debtor. It may be said that the law must award such parties, who may well be styled "innocent parties," ample protection, where they are called upon to respond to some other person than their own contract creditor, as in the case of garnishment. Such questions, of course, must be largely determined by the statutes of the particular state upon the subject of garnishment, and the question arises, ¹²⁷ What are the statutory provisions of this state relating to these matters?

The last act upon the subject of garnishment, which was in force when the proceedings here in question were instituted, will be found in the laws of 1893, commencing at page 95, and contains very general and liberal provisions. In addition to the usual ones allowing persons indebted to, or holding property of, the principal defendant to be garnished, it provides that a joint stock company or corporation, in which the principal defendant is an owner of shares, may be garnished. There are other provisions of the code authorizing the garnishment of a sheriff or constable, a judgment debtor, an executor or administrator, or a fund in court: Code Proc., secs. 306, 307. The law provides that both the plaintiff and the defendant in the principal action may controvert the answer of the garnishee, and provides for a trial of the issue thus formed, and liberal provisions are made as to protecting the garnishee from costs. So it will be seen that the remedy here is a favored, broad, and comprehensive one, and section 322 of the code requires that it shall be liberally construed in furtherance of its objects.

There can be no question as to the practicability of the remedy as applied to the facts of this case, and it would seem, therefore, that the only question is, Does the law afford sufficient protection to the rights of these garnishees and the other joint claimants? If so, a reasonable construction to effect its evident purposes would require us to hold that a joint debt may be reached to satisfy a demand against one of the joint claimants. But we are of the opinion that the other joint claimants must be held to be interested parties in a proceeding like this, as the relations between the ¹²⁸ joint claimants and the garnishee will be so materially changed by virtue of the proceeding. It is clear that the garnishing creditor can only enforce collection of the interest of his debtor in the joint claim, and then only to the extent of satisfying his own claim, and a balance might be left due such debtor from the joint debtor, though less, to the amount of that recovered, than that due to the other joint

claimant. It is evident that such a change in the relations of the parties should not be made without giving the other joint creditor an opportunity to participate in the proceedings and insist upon the payment of the whole claim, and upon his right at that time to his share of the moneys collected. We have no doubt that the joint claimants and their debtor might make any agreement between themselves that was satisfactory to them, as relating to the payment of the balance of the claim after the demands of the garnishing creditors are satisfied; but, for the protection of all parties, the other joint claimants should be brought in, or at least given an opportunity to come into the proceeding to protect their rights, and also to the end that they should be thereby concluded as against the garnishee to the extent of the amount recovered of him.

From the decisions, it looks as though in some instances unnecessary hardships are placed upon a garnishee in such a proceeding, where he has no direct interest, as between the parties, in requiring him to act at his peril to see that the garnishment proceeding is properly instituted and a valid judgment rendered against him, or that otherwise a payment thereunder would be no protection to him in an action by the debtor in the principal action. This could be obviated in all cases by making such principal defendant a party to the garnishment proceedings, where he is ¹²⁰ not one, so that the whole matter could be determined and the rights of all parties concluded and the garnishee thus effectually protected.

Section 150 of the Code of Procedure provides that the court may determine any controversy between parties before it when it can be done without prejudice to the rights of others, or by saving their rights. But when a complete determination cannot be had without the presence of other parties, the court shall cause them to be brought in. This statute not only gave the right or power to bring in the other joint claimants in this instance, but, in our opinion, it should be held as making it obligatory, as such seems to be the intent of the provision. It is true that, in *Marx v. Parker*, 9 Wash. 473, 43 Am. St. Rep. 849, we said that the court could not, upon its own motion, require a third party to intervene in a garnishment proceeding; but this would not prevent the court from requiring a third party to appear upon the application of either of the parties in court. While the method of bringing such third party into court is not clearly pointed out, it seems to us to be clearly authorized in some manner by this section, and also by section 49.

which provides that where jurisdiction is given, all means to carry the proceeding into effect are also given; and, if the course of proceeding is not specifically pointed out by statute, any suitable process or proceedings may be adopted which may appear most conformable to the spirit of the code. This statute was clearly intended for a purpose, and that purpose is apparent. It would apply to a case of this kind, in the absence of any special provision, and it must be held in force, it seems to us, and to cover such a case as this; or it must be held that its provisions are so general as to be ¹³⁰ wholly inoperative, and we can see no reason for so holding and thus depriving it of any effect. Provision is also made whereby the other joint claimant could intervene upon his own motion, or, in case there was a dispute as to the fund, provision is made for the payment of the same into court by the garnishee: Code Proc., secs. 152-156.

Now, while either of the parties could have applied to the court to have the other joint claimants brought into the proceedings, it seems to us that the obligation rested upon the plaintiffs, as they were the moving parties. They might have done this in the first instance, if they knew the facts, by applying to the court for an order and having suitable process or notice served upon the other joint claimants requiring them to appear in the proceeding and ask for such relief as they were entitled to; or, in consequence of a failure to do so, to be concluded by the judgment thereafter rendered; or they might have done so afterward, when the nature of the indebtedness was disclosed. While the defendants in the garnishment proceeding had this privilege, it was not incumbent on them to exercise it, and, as the plaintiffs did not ask to have the matter put in shape so the court could protect the interests of all parties, there was no error in dismissing the proceedings, and for that reason the judgment is affirmed.

Dunbar and Gordon, JJ., concur.

ATTACHMENT—GARNISHMENT OF JOINT DEBT.—If the answer of the garnishee shows that a third person claims the debt or some interest therein, such third person should be cited to appear: *Payne v. Mayor*, 4 Ala. 333; 37 Am. Dec. 744.

DOOLY v. HANOVER FIRE INSURANCE COMPANY.

[16 WASHINGTON, 155.]

INSURANCE, INTEREST OF THE ASSURED, NO QUESTIONS BEING ASKED.—Though a policy contains a condition declaring it to be void if the interest of the insured be other than unconditional or sole ownership, it cannot be avoided on the ground that the insured did not own the legal title, he having purchased the property and paid therefor without having received a conveyance, if no written application was made by him for the policy, and no questions were asked of him concerning his title.

INSURANCE, MISTAKEN ANSWERS, WHEN DO NOT AVOID A POLICY.—If the language of questions contained in an application for insurance calls for answers which may be, to some extent, a matter of opinion, the insured, if answering in good faith, will be excused, though he does not give the desired answer.

INSURANCE, FAILURE TO DISCLOSE FACTS.—If an insured is not questioned respecting encumbrances on his property or other facts material to the insurance, and does not intentionally conceal them, their existence does not invalidate the policy.

H. J. Snively and Fred Miller, for the appellant.

Reavis & Englehart, for the respondent.

¹⁵⁵ DUNBAR, J. This action was brought in the superior court of Yakima county by the plaintiff (appellant herein) to recover from the respondent upon an insurance policy. The policy was issued on the twelfth day of June, 1895, in consideration of the payment by the plaintiff to the defendant of the premium of thirty-three dollars and eighty cents, the amount of the policy being one thousand dollars upon building, two hundred dollars upon furniture and fixtures, and one thousand dollars upon stock of wines, liquors, and cigars. The lot upon which the property insured was situated was held by plaintiff under a contract of purchase with one Walter N. Granger, a trustee. The plaintiff testified that at the time of the issue of the policy he had paid the purchase price in full, and was entitled to a deed therefor. ¹⁵⁶ The building was burned and a certain amount of fixtures and stock of wines, liquors, etc., destroyed. No adjustment could be made, and suit was brought to recover the amount of the policy.

The defense in this action, so far as it is necessary to discuss it here, was based upon a condition in the policy which was as follows: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void, if the interest of the insured in the property covered by said policy be other than unconditional or sole ownership, or if the subject of insurance be a building on ground not owned by the insured in fee

simple, or if the subject of insurance be personal property and be or become encumbered by chattel mortgages."

This provision of the policy was especially pleaded, and, upon the close of plaintiff's testimony, on motion of the defendant, the case was taken from the jury and dismissed at plaintiff's cost. No written application was made for this policy, and the undisputed testimony is, that no questions were asked the insured concerning the title to the land. It also developed in the trial of this cause that there was a mortgage upon certain of the goods, but the testimony of the plaintiff was to the effect that he made this known to the agent of the insurer. The testimony was as follows:

"Q. What did you say about this mortgage? A. He wanted to know whether the property was encumbered, and I said it was, and he wanted to know for how much, and I told him I couldn't tell without looking it up; there was a mortgage on the Zillah property and a mortgage on the North Yakima property to satisfy a debt of Rothchild Brothers. . . .

"Q. Did he ask you anything about the ownership of the property? A. No, sir.

¹⁵⁷ "Q. Did you make any statement whatsoever about the ownership of the property? A. No, sir."

Further on, in direct examination, after being recalled, the following appears:

"Q. Who was the owner of this property that was destroyed? A. I was.

"Q. Both the real property and the personal property? A. Yes, sir.

"Q. And the buildings? A. Yes, sir.

"Q. Now, I want to ask this question, I am not sure that I covered it entirely: Did you make any statement to Mr. Leeper, that is the agent; I believe I asked you whether he asked you any questions about the title? A. Yes, sir.

"Q. And his answer was [no]. Did you make any statement to him about the title? A. No, sir.

"Q. None whatever? A. No more than I told him there was a mortgage upon the property.

"Q. Did you make any statement except about this mortgage on the property, this mortgage to Rothchild Brothers? A. That is all."

There having been no written application in which questions were asked and answered concerning the status of the property, we think, under the authorities and as a question of right, that

this condition which is injected into the policy, among numerous other conditions more or less technical and hard to understand by the ordinary mind, ought not to prevent a recovery, in the absence of any misrepresentation on the part of the insured. The insured, as a matter of fact, ordinarily knows nothing about the policy until it is made out and returned to him after the payments for the same have been made to the agent at the time the contract was made, and the insurer, having failed to obtain this information, must be held to have done so at its peril.

Even where an application has been made, which ¹⁵⁸ is the instrument to which the insured's attention is especially called and upon which he relies, it is held that where the language of the questions contained in the application calls for answers, which may be to some extent a matter of opinion, if the insured answers in good faith, he will be excused, though he does not give the desired answer: *May on Insurance*, sec. 166.

The ordinary layman is not presumed to know what a fee simple title is, and, in the absence of any questions which would tend to enlighten him as to the true definition of that phrase, he might very well conclude that he was the owner in fee simple if he was the owner and in possession and had such title to the property as is testified to by the assured in this case. Much more liberally ought the language to be construed when it is found in the policy alone and not in an application to which the assured is directly a party.

"The issuing of a policy," says Mr. May in the section above referred to, "on an application which, without fraud, contains no answer to certain questions, is a waiver of answer to those questions, even though, in answer to another question, the insured may have said there were 'no other circumstances affecting the risk'; and, to avoid the policy in such cases, the insurers must prove untrue statements other than those inquired about."

The rule as announced by Wood on Insurance, section 212, is as follows: "When no inquiries are made, the intention of the insured becomes material, and, in order to avoid the policy, they must find, not only that the matter was material, but also that it was intentionally fraudulently concealed."

And in *Insurance Co. of North America v. Bachler*, 44 Neb. 549, it was held that: "Where the insured was not questioned as to encumbrances ¹⁵⁹ on his property, and did not intentionally conceal the facts, the existence of a mortgage thereon did not invalidate the policy," following *Van Kirk v. Citizens' Ins. Co.*, 79 Wis. 627.

The court in that case found that the existence of the mortgage on the property was a fact material to the risk, but that, no inquiries having been made by the agent of the insurance company as to the condition of the title to the property, and the insured having said nothing about the existence of the mortgage for the reason that he did not know that it was his duty to disclose the existence of the mortgage, it was not, under the circumstances, a representation that the insured property was free from the mortgage.

In *O'Brien v. Ohio Ins. Co.*, 52 Mich. 131, it was held that: "Where insurance is applied for orally, and the applicant is unaware of any provision in the policy regarding encumbrances, and is not guilty of any misleading conduct, his bare silence cannot be deemed a misrepresentation; and if the agent in such a case did not read the policy to the applicant, or call his attention to the clause relating to encumbrances, the existence of a mortgage would be no impediment to a recovery from the insurance company."

"If an insurer," said the court, "is apparently indifferent whether a property is unencumbered, and is content to insure without in any way suggesting an interest in the question, the bare silence of the applicant upon it cannot be deemed a misrepresentation."

In *Clark v. Manufacturers' Ins. Co.*, 8 How. 235, after giving the general rule concerning the answering of questions, the court says: "But the relation of the parties seems entirely changed, if the insurer asks no information and the ¹⁰⁰ insured makes no representations. That is the chief novelty in this question, as hypothetically stated in the bill of exceptions. We think that the governing test on it must be this: it must be presumed that the insurer has in person or by agent in such a case obtained all the information desired as to the premises insured, or ventures to take the risk without it, and that the insured, being asked nothing, has a right to presume that nothing on the risk is desired from him."

And further on the court says: "But when representations are not asked or given, and with only this general knowledge the insurer chooses to assume the risk, he must, in point of law, be deemed to do it at his peril. 'With this knowledge, and without asking a question, the defendant underwrote; and by so doing he took the knowledge of the state of the place upon himself,' etc.": Citing 1 Marshall on Insurance, 481, 482; *Carter v. Boehm*, 3 Burr. 1905; and a distinction is made between cases of fire insurance and of marine insurance, because in the case of

fire insurance the subject insured is usually situated on land and nearer, so as to be examined more easily by the company or its agents, and the circumstances connected with it are more uniform and better known to all. To sustain this is cited *Jolly v. Baltimore etc. Soc.*, 1 Har. & G. 295; 18 Am. Dec. 288; *Burritt v. Saratoga etc. Ins. Co.*, 5 Hill, 192; 40 Am. Dec. 345.

The same doctrine was announced in *Washington Mills etc. Mfg. Co. v. Weymouth etc. Fire Ins. Co.*, 135 Mass. 503, where the court, in the course of its argument, said: "The plaintiff made no misrepresentations and no concealment as to its title. The policy is upon the buildings. The defendant saw fit to issue this policy without any specific inquiries of the plaintiff as to the title to the land, and without any representations by ¹⁶¹ the plaintiff upon this point. It was its own carelessness, and it cannot avoid the policy without proving intentional misrepresentation or concealment on the part of the plaintiff. An innocent failure to communicate facts about which the plaintiff was not asked will not have this effect": Citing many prior Massachusetts cases.

A great many other cases might be cited to sustain this doctrine. It is true that the cases are not entirely uniform on this proposition, but we think the great weight of authority and the better reasoning sustains the appellant's contention.

So far as the question of notice of proof was concerned, the testimony was overwhelming that the company had disclaimed responsibility for the loss. Under such circumstances no proof was necessary.

The judgment will be reversed with instructions to overrule the motion for a nonsuit.

Hoyt, C. J., and Scott, Gordon, and Anders, JJ., concur.

INSURANCE—FIRE—INTEREST OF THE ASSURED.—A condition in a policy of insurance, that it shall be void in case the interest of the insured be other than unconditional and sole ownership, has reference only to the quality of the estate or interest, and is not avoided by any sort of encumbrance: *Caplis v. American Fire Ins. Co.*, 60 Minn. 376; 51 Am. St. Rep. 535; *Morotock Ins. Co. v. Rodefer*, 92 Va. 747; 53 Am. St. Rep. 846.

INSURANCE—FIRE—FAILURE TO DISCLOSE FACTS.—An applicant for insurance is not required to show the exact condition of his title to the property sought to be insured, unless he is requested so to do, and if his application is oral and no deceit is practiced, his failure to mention encumbrances, where no inquiry is made concerning encumbrance, is immaterial: *Hall v. Niagara etc. Ins. Co.*, 93 Mich. 184; 32 Am. St. Rep. 497.

INSURANCE—FIRE—MISTAKEN ANSWERS.—Misstatement as to value of property must be dishonest to avoid the policy. *Phenix Ins. Co. v. Pickel*, 119 Ind. 155; 12 Am. St. Rep. 393, and note.

WALLA WALLA v. MOORE.

[18 WASHINGTON, 359.]

TAXATION—SITUS OF PROPERTY HELD BY EXECUTORS OR TRUSTEES.—Upon the death of the owner of personal property, leaving a will and appointing executors, who by the duties imposed upon them are really made trustees of his estate, the situs of such personal property, for the purposes of taxation, is at the domicile of such executors, and not in that of the decedent at the time of his death.

C. M. Rader, for the appellant.

B. L. and J. L. Sharpstein, for the respondents.

³³⁹ DUNBAR, J. The appellant, the city of Walla Walla, brought this action in the superior court of Walla Walla county to collect from the defendants the sum of two thousand six hundred and sixty dollars and seventy cents, municipal taxes, together with interest on the same, penalty, etc.

This case was tried upon a stipulation of the facts and the pleadings. It appears from the stipulation that one Dorsey S. Baker died in the city of Walla Walla on the fifth day of July, 1888, leaving a last will and testament, which will appointed the said defendants executors. The defendants Miles C. Moore, Edwin F. Baker, and Walla Walla Willie Baker, it is conceded, do not reside within the city of Walla Walla, while it is stipulated that Henry Clay Baker, one of ³⁴⁰ the executors, does reside within the city of Walla Walla. One-fourth of the amount of the taxes was tendered by Henry Clay Baker for himself and his codefendants to the treasurer of Walla Walla City, also the taxes on a small amount of furniture, which it is conceded is situated in Walla Walla City.

The trial court found for the defendants, and from that judgment an appeal is taken here by the city, and it is claimed that the property should respond to an assessment in the city where the decedent died. It does not appear strictly from the pleadings or the facts stipulated that the decedent Baker was a resident of the city of Walla Walla. The most that does appear is that he died in Walla Walla, leaving personal property in that city.

The authorities are somewhat divided on the proposition as to whether the property of the decedent which is represented by the executor or administrator should be taxed at the residence of the decedent or at the residence of the executor or administrator. In *Mayor etc. v. Alexander*, 10 Lea, 475, a case cited by appellant, it was decided that the legal title in such case is in the

executor for the purposes of administration; that he holds the property as trustee, and so, having the title with himself, the situs of the property for the purpose of taxation is clearly the residence or domicile of the executor. In *Cameron v. Burlington*, 56 Iowa, 320, it was held that where the administrator of an estate, having personal property thereof in his possession, resided in the same county in which his decedent died, but in a different township, such property was taxable in the township of his residence.

The same rule was followed in *State v. Jones*, 39 N. J. L. 650; and in *State v. Collector*, ³⁴¹ 39 N. J. L. 79, it was held that the tax upon personal property in possession, or under control, of the executor should be against the person holding the office in his representative character, and such tax could be assessed only in the township where the executor resided, for all such property, wherever situated. And such, we think, is the well-established rule in cases where the property is in the hands of an executor, although there are some cases holding to the contrary. But we see no good reason why the decedent's property should be compelled indefinitely to respond to taxes in a locality where he happened to reside when he died. If he had moved away himself, of course the situs would have changed, so far as the taxation of this character of property was concerned, and, the property having passed into the hands of representatives of the decedent, there seems to be no good reason why their domicile should not be taken into consideration in the taxation of the property which they represent and control.

But the will in this case, which is a part of the stipulation, convinces us that these defendants, while they are named as executors, are, by the duties which are imposed upon them, really made trustees of this estate, and under all the authorities the situs of the property is with the trustees: See 1 *Desty on Taxation*, 337; *Mayor etc. v. Stirling*, 29 Md. 48; *State v. Matthews*, 10 Ohio St. 431; *Trustees v. Augusta*, 90 Ga. 634; *State v. Collector*, 39 N. J. L. 79. In fact, the general current of authority is in this direction.

The appellant cites *Cooley on Taxation*, page 270 (which is page 375 of the second edition to which we have access), to sustain the contention that all the ³⁴² personal property belonging to the decedent's estate has its situs at the place of residence of the decedent, but we do not think the text sustains the contention. It sustains exactly the reverse. Mr. Cooley says: "In general, personal estate in the hands of a trustee is to be assessed

to him at the place of his domicile": Citing some of the cases to which we have above referred, and many others. "If the fund is in charge of a court, it is taxable in the jurisdiction having control of it." But it will be noticed that in this case the estate is not in charge of the court, and no court is exercising or can exercise any jurisdiction over it under the provisions of the will itself, which especially provides that the estate shall be conducted by the executors, and that they shall be relieved from supervision and control of all courts, answering only to the tribunal of their own consciences for fidelity in their special office, providing, among other things, that they should not be required to give bonds. This direction was made under the provisions of section 1443 of the code of 1881, and, under the directions of this will and of said section, all the supervision that the court had was to admit to probate such will, and, after the will was proven, the estate passed untrammelled, under the conditions of the will, into the hands of the executors or trustees.

The judgment will be affirmed.

Scott, C. J., and Gordon and Reavis, JJ., concur.

TAXATION—PERSONAL PROPERTY.—A state has a right to tax all personal property found within its jurisdiction, without regard to the place of the owner's domicile: *Denver etc. Ry. Co. v. Church*, 17 Colo. 1; 81 Am. St. Rep. 252, and note. See, also, *Commonwealth v. American Dredging Co.*, 122 Pa. St. 386; 9 Am. St. Rep. 116.

MORRIS v. GRAHAM.

[16 WASHINGTON, 343.]

NAVIGABLE WATERS, RIGHT OF PRIVATE PERSONS TO ENJOIN PUBLIC NUISANCE IN.—One engaged in the business of fishing in the navigable waters of the state may maintain an action in behalf of himself and all others similarly situated to enjoin the erection of a fishtrap or pound net in the channel of a navigable stream, if such erection will render it impossible for the plaintiff and others in whose behalf the suit is brought to pursue the common right of fishing in waters in that vicinity.

NUISANCE, PUBLIC, SPECIAL DAMAGE ENTITLING PLAINTIFF TO ENJOIN.—Persons engaged in the exercise of their common right of fishing in the waters of a navigable stream suffer from the construction and maintenance of a fishtrap or pound net in the channel of such stream a damage and special injury in which the general public do not share, and may, therefore, maintain a suit to enjoin the continuance of such injury.

FISHING, LICENSE FOR, INTERPRETATION OF.—A license to fish granted by the fish commissioners of the state of Washington pursuant to the statutes of such state constitutes what

is termed a "roving" license only, and does not entitle the licensee to construct or maintain a fishtrap or pound net by the operation of which other fishermen must be prevented from pursuing their business.

W. H. Pritchard, Stiles & Stevens, and Coleman & Hart, for the relator.

P. C. Sullivan, A. F. Burleigh, Bell & Austin, and Crowley & Grosscup, for the respondent.

³⁴³ GORDON, J. Respondent, on behalf of himself and others similarly situated, instituted this action in the superior court of Skagit county to enjoin and restrain the appellants from erecting a fishtrap or pound net in the channel of the North Fork of the Skagit river, where the same empties into the waters of Puget Sound. Issue of fact was joined, and the cause proceeded to trial. Upon findings and conclusions entered, the lower court rendered a decree perpetually ³⁴⁴ enjoining and restraining the appellants from making or constructing said trap. The appeal is from said decree.

It is urged in the brief of appellants' counsel that the respondent has no such interest in the subject matter of litigation as enables him to maintain the action; that the stream in question is a navigable stream, and the acts threatened by appellants would constitute a public nuisance, if unlawful at all, and that such nuisance cannot be abated through a private person, but that the suit should have been instituted on the relation of the attorney general.

It appears from the findings (which are amply supported by competent evidence) that to construct said fishtrap or pound net it would be necessary to drive into the bed of the channel, piles, or stakes, at intervals of about ten feet, to which the appliances of the trap might be attached; that the pound proposed to be erected would be in dimensions about forty feet square; that the channel in which appellants proposed to erect said trap is the only channel leading from said stream into the waters of Puget Sound; that it has for years been open to the common use of the public and of the respondent and his fellow fishermen plying their vocations with drift nets or gill nets for the purpose of catching salmon. It further appears that said fishermen had kept the channel and ground in said vicinity clear and free of logs and sticks, to enable them to carry on their business; that the fishing grounds extended into the waters of the sound for a distance of about three-fourths of a mile, and the principal run of salmon is through the channel in which appellants desire to

construct their trap; that the width of the channel at extreme low-water mark is only about forty-five feet; that the trap, if constructed, ³⁴⁵ would render it impossible to drift nets through the channel on either side of the trap, and that the plaintiff and the other fishermen in whose behalf the suit is brought would be deprived of the common right of fishing in the waters in that vicinity.

In this connection it should be stated that there was no demurrer or other motion addressed to the complaint, and we think that it is sufficient to support the findings and decree as against any objection made to it after issue of fact was joined.

The objection that the suit should have been brought upon the relation of the attorney general, and that the respondent has no such interest as would enable him to maintain the action, is not well taken. He brings it on behalf of himself and others whose rights are similarly affected. It is brought in behalf of a class, and the injury complained of is not common to the general public, but peculiarly affects the respondent and those in the class to which he belongs. The acts complained of constitute a damage and special injury to him, in which the general public do not share. The fact that others would suffer in the same way, if they were similarly engaged, constitutes no bar to the maintenance of the present action. As is aptly said by Mr. Justice Beatty, in *Spokane Mill Co. v. Post*, 50 Fed. Rep. 429: "If what others might suffer under the same circumstances were made the rule, then in no case could it be said individuals ever suffer special damages from a public nuisance."

In *Lansing v. Smith*, 4 Wend. 9, 21 Am. Dec. 89, Chancellor Walworth says: "Every individual who receives actual damage from a nuisance may maintain a private suit for his own ³⁴⁶ injury although there may be many others in the same situation": See, also, *Skinner v. Hettrick*, 73 N. C. 53.

It is further objected that the complaint does not show that the respondent is a citizen of the state and entitled to fish in its navigable waters. The complaint alleges that he has been engaged in the business of fishing at the point in question for upward of a year prior to instituting the action. This, in connection with the other allegation, was sufficient as against the objection so unseasonably made. To permit the construction and operation of this trap would afford the appellants the sole right to fish at the point in the navigable water already referred to. The right which they seek to exercise for their exclusive benefit is a right common to all of the citizens of the state, in the absence of express prohibitory legislation.

Another contention of appellants is, that they are entitled to construct and operate the trap by virtue of a license to fish granted to them by the state fish commissioner pursuant to the act of February 10, 1893: Laws 1893, p. 15. In *State v. Crawford*, 14 Wash. 373, we decided adversely to this contention of appellants, holding that the legislative act did not contemplate a license to fish at any designated point but only what is termed a "roving" license.

We have examined the several objections raised in the able brief of appellants' counsel, but are unable to conclude that any error was committed by the lower court calling for a reversal of the decree, and it is affirmed.

Scott, C. J., and Anders, Dunbar, and Reavis, JJ., concur.

FISHERIES—RIGHT OF PUBLIC.—The right to take shell-fish from natural beds in tide waters of this state is a part of the public right of fishery common to all the citizens of the state, which may be exercised by them at will, except so far as it is restrained by positive law or by grants from the state to individuals. And they cannot be deprived of this right by the unauthorized attempt of a person to appropriate the bed of the waters to his own private use: *Brown v. De Groff*, 50 N. J. L. 409; 7 Am. St. Rep. 794, and note. See, also, extended note to *Sterling v. Jackson*, 13 Am. St. Rep. 416-420.

NUISANCE—PUBLIC—PRIVATE ACTION FOR.—A private action for a public nuisance is maintainable by one who suffers therefrom some particular loss or damage beyond that suffered by him in common with all others affected by the nuisance. Interference with a common right does not of itself afford a cause of action by an individual, but special or particular damage consequent on the interference does: *Knowles v. Pennsylvania R. R. Co.*, 175 Pa. St. 623; 52 Am. St. Rep. 860, and note; *Brown v. De Groff*, 50 N. J. L. 409; 7 Am. St. Rep. 794.

SENGFELDER v. HILL.

[16 WASHINGTON, 355.]

RECEIVER.—IN AN ACTION TO RECOVER THE POSSESSION OF REAL PROPERTY to which the title is disputed and of which both parties claim to be owners in fee, a receiver will not be appointed to take possession of the property from the defendant or to receive the rents and profits thereof.

PRACTICE—AMENDED COMPLAINT.—Though the original complaint may, for some purposes, be deemed a part of the record, nevertheless the plaintiff cannot avail himself of the allegations contained therein but omitted from his amended complaint.

A. G. Avery and Blake & Post, for the appellants.

Plummer & Thayer, for the respondents.

³⁵⁵ GORDON, J. Plaintiffs in the court below (respondents here) brought this action to recover possession of certain real property described in the complaint, located in the city of Spokane, and for damages and a receiver, pendente lite, to take charge of the property and collect the rents, etc. Upon the property in dispute there is a large, four-story building, occupied by numerous tenants. The amended complaint alleges that the respondents are the owners in fee and entitled to the possession of the property, that the appellants, without right or title, entered into possession of it, and unlawfully withhold possession, to plaintiff's damage in the sum of twenty-five thousand dollars. Thereafter, and within the time in which the appellants were by law permitted ³⁵⁶ to answer, and prior to any answer, respondents moved for the appointment of a receiver. A hearing was had and a receiver appointed to take charge of said property. The defendants appeal.

In opposition to the motion for the appointment of a receiver, the appellants introduced numerous affidavits to the effect that appellants Breslauer, Wise, and Ostroski were the owners in fee of the property in dispute; that they derived title by deed of general warranty from respondent C. W. Carson, to whom they had paid one hundred and ten thousand dollars as purchase price thereof; that, pursuant to such purchase, they entered into possession of the property, and had been in actual, open, and notorious possession thereof, and of the whole thereof, for upward of three years prior to the commencement of the action; that their codefendants and appellants were their tenants; that the legal title to said premises of record in the office of the auditor of said county was in said appellants Breslauer, Wise, and Ostroski; that they were solvent and abundantly able to respond in damages, if damages should be awarded against them. No other proof of title in either party was offered or received upon the hearing. It would seem to require little argument to demonstrate that the order appointing a receiver, under the circumstances, was unwarranted.

"The rule seems to be universal in this country and in England that, whenever the contest is simply a question of disputed title to the property, the plaintiff asserting a legal title in himself against a defendant in possession and receiving the rents and profits under a claim of legal title, equity refuses to lend its extraordinary aid by interposing a receiver, just as it refuses an injunction under similar circumstances, leaving the plaintiff to assert his title in the ordinary ³⁵⁷ forms of procedure at law":

Rollins v. Henry, 77 N. C. 467. See, also, 3 *Pomeroy's Equity Jurisprudence*, 2d ed., sec. 1333; *High on Receivers*, 3d ed., sec. 553, et seq.

In *Brundage v. Home etc. Assn.*, 11 Wash. 277, this court said: "Courts will not appoint a receiver except when it is necessary either to prevent fraud, protect property from injury, or preserve it from destruction, and mere allegations of these facts are not sufficient to authorize a court to appoint a receiver."

It appears from the transcript that, in the original complaint in the action, plaintiff's title is set out with particularity, and it is contended that the court below based its order in part upon this original complaint. The motion for the appointment of a receiver was based upon the records and files, and it is further contended that the original complaint was a part of said record. While it is undoubtedly true that for certain purposes an original complaint does not cease to be a part of the record even though an amended complaint be subsequently filed, nevertheless the plaintiff cannot avail himself of any allegations contained in the original complaint. When he elects to amend and does amend, he must stand upon the case as stated in his amendment. Section 222 of the Code of Procedure provides that, when any pleading is amended, it shall be done by filing a new pleading, and "such amended pleading shall be complete in itself, without reference to the original, or any preceding amended one." While, in a proper case, his adversary might avail himself of matter contained in an original complaint, we think it cannot be invoked by plaintiff in his own behalf.

³⁵⁸ No proper case was made for the appointment of a receiver herein, and the order appealed from will be reversed.

Scott, C. J., and Dunbar and Reavis, JJ., concur.

RECEIVERS—WHEN MAY BE APPOINTED.—The appointment of a receiver is, as a general rule, discretionary. The discretion is not arbitrary or absolute; it is a sound and judicial discretion, taking into account all the circumstances of the case, exercised for the purpose of promoting the ends of justice and of protecting the rights of all parties interested in the controversy and subject matter, and based upon the fact that there is no other adequate remedy or means of accomplishing the desired objects of the judicial proceeding: *Fort Payne Furnace Co. v. Coal etc. Co.*, 96 Ala. 472; 38 Am. St. Rep. 109, and note. See, also, *Murray v. Murray*, 115 Cal. 266; 56 Am. St. Rep. 97.

PLEADING—AMENDED COMPLAINT—EFFECT OF.—The amended complaint takes the place of the original, and is therefore the proper pleading to deposit in the postoffice where the service is made by publication: *Mudge v. Steinhart*, 78 Cal. 34; 12 Am. St. Rep. 17. See, also, *Reinhart v. Lugo*, 86 Cal. 395; 21 Am. St. Rep. 52.

STATE v. DOHERTY.

[16 WASHINGTON, 202.]

JURY TRIAL, WHEN GUARANTEED BY THE CONSTITUTION.—A constitutional provision declaring that the right of trial by jury shall remain inviolate guarantees only the right of trial by jury as it existed at the adoption of the constitution.

QUO WARRANTO—JURY TRIAL.—In proceedings in quo warranto, the defendant is not entitled to a trial by jury, though the constitution provides that the right to trial by jury shall remain inviolate if, before its adoption, such right did not extend to such proceedings. At the common law, right to trial by jury did not extend to proceedings in quo warranto.

ELECTIONS, FAILURE TO POST PROPER NOTICE.—Though an ordinance directs the posting at polling places within the city of a certified copy of the notice of election and of every one of the proposed amendments to the city charter to be voted upon, the failure of the clerk to post such certified copy will not invalidate the election, if newspaper clippings containing correct copies were posted in all of the polling places, and the notice of election was also published in the newspapers circulating throughout the city, and the amendments to be voted upon were matters of public notoriety.

ELECTIONS, MANNER OF GIVING NOTICE.—A state constitution requiring that certain elections shall be had only upon notice specifying the object of the election given in all the election districts of the city for ten days before it is held does not prescribe the method of giving such notice, and therefore an election cannot be held invalid on the ground that the notices were not posted in each election precinct, if notice was otherwise given in such a manner that the great body of electors had actual notice of the time and place of holding the election and of all questions submitted.

ELECTIONS, INFORMALITIES IN NOTICE.—Formalities in giving notice prescribed by statute are regarded as directory merely, unless there is a declaration that the failure to observe a particular formality shall render the election void. An election will, therefore, not be declared invalid for the omission of some formality in the notice, if it appears that the time and place of holding the election and the questions to be submitted had become matters of general notoriety, and that the great body of electors participated in the election.

MUNICIPAL CORPORATIONS—OFFICE, APPOINTMENT TO, WHEN MUST BE CONFIRMED.—An appointment to a municipal office need not be confirmed by the city council, if an amendment to its charter provides that the person appointed by the mayor shall hold office at the pleasure of the appointing power, and that conflicting provisions of the charter shall be deemed amended accordingly.

MUNICIPAL CORPORATIONS—CHARTER, FAILURE TO RECORD AMENDMENTS.—If amendments to a charter are adopted by a vote of the electors, the failure to record them in the charter-book by the proper officer does not deprive them of their effect. The only object to be attained by recording them in a particular manner is to enable the courts of the state to take judicial notice of them without other evidence.

ELECTIONS.—A NOTICE OF AN ELECTION AT WHICH AMENDMENTS TO A MUNICIPAL CHARTER are to be voted

upon sufficiently specifies the object of the election when it refers to an ordinance containing the proposed amendments, though it does not otherwise disclose their contents.

Govnor Teats and W. C. Sharpstein, *amicus curiae*, for the appellant.

Claypool, Cushman & Cushman, and Doolittle & Fogg, for the respondent.

³⁸³ GORDON, J. This action was instituted in the superior court of Pierce county to oust the appellant, ³⁸⁴ Doherty, from the office of commissioner of public works of the city of Tacoma. The relator, Mullen, was a member of the board of public works appointed under the provisions of the city charter of the city of Tacoma, and the appellant, Doherty, claims the office by virtue of certain amendments to the city charter which he alleges were adopted by the legal voters of the city at an election held on April 7, 1896. Under the provisions of these alleged amendments, Doherty claims to have been duly appointed as commissioner of public works. The contention of the relator is, that these amendments were never legally adopted and that they are inoperative and void. Issue of fact was joined and the cause tried to the court. Findings of fact and conclusions were duly entered, upon which judgment was entered for the relator, from which judgment Doherty has appealed.

The first point urged in the brief of the appellant is, that the court erred in overruling appellant's demand for a jury trial. The contention is that sections 32, 33, and 34 of the act of March 15, 1893 (Sess. Laws 1893, p. 416), are unconstitutional in that they abridge the right to a trial by jury. The provision of the constitution relied upon is found in section 21 of article 1 of the declaration of rights, which, among other things, provides that "the right of trial by jury shall remain inviolate." The decisions bearing upon this branch of the case are conflicting, but an examination of the numerous cases cited, and others not referred to by counsel, has satisfied us that the great weight of authority in this country is against the position contended for by appellant's counsel. The effect of the declaration of the constitution above set out is to provide that the right of trial by jury, as it existed in the territory at the time when the constitution was adopted, should be ³⁸⁵ continued unimpaired and inviolate: *Whallon v. Bancroft*, 4 Minn. 109; *State v. Minnesota Thresher Mfg. Co.*, 40 Minn. 213; *Taliaferro v. Lee*, 97 Ala. 92.

Section 248 of the code of 1881 in force at the date of the

adoption of the present constitution was as follows: "Either party shall have the right in an action at law, upon an issue of fact, to demand a trial by jury."

But proceedings in quo warranto, prohibition, and the like are special and extraordinary proceedings and do not fall within the purview of section 248 of the code of 1881, which restricted the right of trial by jury to actions denominated as actions at law: *Whallon v. Bancroft*, 4 Minn. 109; *State v. Minnesota Thresher Mfg. Co.*, 40 Minn. 213; *Taliaferro v. Lee*, 97 Ala. 92.

This construction of the constitutional provision in question harmonizes with the further provision contained in section 4 of article 4 of the constitution, which provides that, "the supreme court shall have original jurisdiction in . . . quo warranto," and any other construction of the first-mentioned provision would render the latter provision of the constitution nugatory and ineffectual. But, aside from this, we think that, by the great weight of authority, the right to trial by jury in quo warranto proceedings did not exist at common law at the date of the early settlement of this country. We have discovered no case in which the right was upheld prior to the passage of the act of parliament in 1730, known as 3 George II, chapter 25, and, as well said by the supreme court of Arkansas in *State v. Johnson*, 26 Ark. 281: "If this right existed before this time, it was certainly ^{see} a work of supererogation on the part of parliament to enact the law."

One of the best considered cases which we have examined upon this subject is that of *Taliaferro v. Lee*, 97 Ala. 92, decided in 1893, wherein it is said that: "In proceedings to try the right to a public office, there was no common-law right of the suitor to a trial by jury, and hence, such suitor is not within the protection guaranteed by that clause of the bill of rights which provides that the right of trial by jury shall remain inviolate": See, also, *Spelling on Extraordinary Relief*, sec. 1875; *State v. Vail*, 53 Mo. 97; *Wheat v. Smith*, 50 Ark. 266; *State v. Lupton*, 64 Mo. 415; 27 Am. Rep. 253.

2. The respondent contends that the charter amendments upon which the right of the appellant to the office is based were never legally submitted or adopted by the voters, because the notice required by the constitution and laws of the state and ordinance of the city council was not given. The provision of the constitution upon which this contention rests is section 10 of article 11, providing: "All elections in this section authorized

shall only be had upon notice, which notice shall specify the object of calling such election, and shall be given for at least ten days before the day of election in all election districts of said city."

The provision of the statute, upon which the respondent relies, makes it the duty of the legislative authority of the city to "give at least ten days' notice in each election district of said city, by publishing such notice in two daily newspapers published in said city, and by causing the same to be posted at each polling place in the several ³⁸⁷ election districts thereof, of an election, which notice shall specify the object for which said election is called": Act of March 24, 1890, sec. 3; Sess. Laws 1890, p. 216.

Section 4 of the ordinance submitting the proposed amendments is as follows: "That it shall be the duty of the city clerk, and he is hereby ordered and required to post at each of the polling places within the city of Tacoma, on or before said April 7, 1896, so that the same shall be prominently posted upon that date, a full, true, and correct certified copy of each and every one of the proposed amendments to the said city charter as contained in this ordinance, for reference by electors and election officers."

The clerk complied with section 4 of the ordinance in all particulars, except that he did not post certified copies of the proposed amendments in the different polling places within the city. But the court found that newspaper clippings containing copies of the proposed amendments "were duly posted in all of the voting booths of the city of Tacoma by the election officers at said voting places." The court also found that notice of the election signed by the city clerk was published in the Tacoma Daily Ledger, the Tacoma Morning Union, and the Evening News—all daily newspapers published in said city—from the 28th of March to the seventh day of April, inclusive, and that no other or further notice of such election, nor the election on said proposed amendment, was given. The court found that these newspapers circulated throughout the political divisions of the city of Tacoma, and one hundred and twenty thousand copies were distributed in each and every one of the political divisions and precincts; also, "that the said amendments were discussed by the ³⁸⁸ people generally in their homes, from the platform, and from the pulpit in the various churches of the city to such an extent that the pendency of said election for the adoption or rejection of said proposed amendments was a matter of public notoriety throughout said city."

The election at which these proposed amendments were submitted was the annual municipal election provided by law for the election of city officers. It appears from the record that at that election 5364 was the highest number of votes cast, and that of this number 3094 votes were cast upon the question of the amendment which related to the office of commissioner of public works. The trial court concluded: "That the posting of full, true, correct, and certified copies of each and every one of the proposed amendments to the city charter, as contained in ordinance 1061, at each of the polling places in the city of Tacoma on or before April 7, 1896 [the date provided for the election], was a prerequisite to the holding of the election on said date as to the adoption of the said proposed amendments, and such notice not having been given, no legal election was had." Also, "that the notice prescribed by section 10, article 11, of the constitution of the state of Washington, and section 3 of the act of the legislature of said state, on March 24, Laws of 1890, was and is a notice to be posted at each polling place and in each election district of the city proposing to adopt charter amendments."

We think the conclusions of the learned trial judge cannot be sustained. The section of the constitution referred to is silent as to the method of giving notice. In other words, it does not provide the particular kind of notice or state how it shall be given. The language is, that notice "shall be given for at least ten days . . . in all election districts of the city." We think ~~see~~ it does not follow from this language that notice could only be "given" by posting notices in each election precinct, and yet that is what the court in effect held. But it must be conceded that the kind of notice prescribed by the statute and the ordinance was not given, and the question turns upon whether the failure to give such notice invalidates the election. The rule established by an almost unbroken current of authority is, that the particular form and manner pointed out by the statute for giving notice is not essential, and where the great body of the electors have actual notice of the time and place of holding the election, and of the questions submitted, this is sufficient. The vital and essential question in all cases is, whether the want of the statutory notice has resulted in depriving sufficient of the electors of the opportunity to exercise their franchise to change the result of the election: *Wheat v. Smith*, 50 Ark. 266; *McCrary on Elections*, sec. 143 et seq; *Cooley's Constitutional Limitations*, 88 et seq; *Dishon v. Smith*, 10 Iowa, 212; *State v. Grey*, 21 Nev. 378; *Chicago etc.*

R. R. Co. v. Pinckney, 74 Ill. 277; Commonwealth v. Smith, 132 Mass. 289; State v. Jones, 19 Ind. 356; 81 Am. Dec. 403.

Indeed, we think the question must be regarded as settled in this state by the decision of this court in Seymour v. Tacoma, 6 Wash. 427. It was there said that: "The formalities of giving notice, although prescribed by statute, are directory merely, unless there is a declaration that unless the formalities are observed the election shall be void. 'It is a canon of election law that an election is not to be set aside for a mere informality or irregularity which cannot be said in any manner to have affected the result of the election': Dillon on Municipal Corporations, sec. 197, note 3, and cases cited."

³⁹⁰ Applying this well-established rule to the facts found in the case at bar, it becomes at once apparent that the failure of the city clerk to discharge his full duty under the law, and to observe in detail the provisions of the statute and ordinance in reference to the giving of notice, did not render the election invalid.

Having ascertained "that the amendments were discussed by the people generally in their homes . . . to such an extent that the pendency of said election for the adoption or rejection of said proposed amendments was a matter of public notoriety throughout said city," and having further ascertained by the vote actually polled that the great body of the electors expressed their will upon these amendments, which it was their province to adopt or reject, the conclusion is inevitable that the result of the election was not affected by the fact that a literal compliance with the formalities prescribed by law for giving notice was not observed. The very purpose for which the statute directed the posting of notices was accomplished when actual knowledge of the election was brought home to the voter, it matters not by what means the knowledge was imparted to him. To hold otherwise would be to disregard the expressed will of the people in a matter which the law has confided to them.

3. The lower court found that the appointment of Doherty was never confirmed by the city council, and upon this finding based a conclusion that he had no right to assume the privileges or duties of the office of commissioner of public works until his appointment was confirmed by the city council. The respondent contends that this in itself constitutes sufficient reason for affirming the judgment, but we think the conclusion that without confirmation by the council the ³⁹¹ appellant could not hold

the office here in dispute, was unwarranted. Section 1 of amendment No. 3, which we have found was adopted, does not require that the appointment of the commissioner of public works shall be confirmed; on the contrary, it expressly provides that the person appointed by the mayor "shall hold office at the pleasure of the appointing power," and it further provides that conflicting provisions of the charter should be deemed amended accordingly.

4. We do not deem it necessary to advance further reasons for our conclusion that the court erred in holding that the amendments failed because they were recorded in the charter-book by the city comptroller, acting as city clerk, instead of by the city clerk. What has been said under point 2 in this opinion applies with equal force to this question, and, in addition thereto, the omission of the clerk to record the amendments would at most only concern the manner in which they might be proved. They became amendments by virtue of the vote of the electors and not by virtue of their being recorded in a particular method. The only object attained by recording them in a particular manner is, that they are thereby entitled to have judicial notice taken of them by all courts of the state.

5. We think the notice of election as published was sufficient, when considered in connection with the ordinance which contained the proposed amendments—and of the existence of which all persons within the city must be presumed to have had knowledge—to convey to the voters all necessary information in reference to the character of the proposed amendments, and hence the notice sufficiently specified the object for which the election was called, within the meaning of the constitutional provision regarding notice.

³⁹² We have also examined the other objections urged in the brief of respondent against the validity of these amendments, and, without especially enumerating them, we deem it sufficient to say that we do not regard them as being entitled to serious consideration. Upon the record, we think that the appellant was entitled to judgment confirming his right to the office, and that the court erred in directing otherwise.

The judgment appealed from will be reversed and the cause remanded with instructions to the lower court to proceed to render judgment in favor of the appellant in accordance with this opinion.

Scott, C. J., and Reavis and Anders, JJ., concur.

JURY TRIAL—WHEN GUARANTEED BY THE CONSTITUTION.—A provision that a trial by jury "as heretofore used shall remain inviolate," in the Georgia constitution, applies to that right as it existed in 1788, and does not require a jury trial in all cases: *Mint River Steamboat Co. v. Foster*, 5 Ga. 194; 48 Am. Dec. 248; *Donahue v. Meister*, 88 Cal. 121; 22 Am. St. Rep. 283. See, also, *Lynch v. Metropolitan etc. Ry. Co.*, 129 N. Y. 274; 26 Am. St. Rep. 523.

ELECTIONS—WHAT IRREGULARITIES WILL INVALIDATE.—It is essential to a valid election that it be held by lawful authority, substantially as prescribed by law: *State v. Taylor*, 108 N. C. 196; 23 Am. St. Rep. 51, and note. But there is a difference in effect between violations of mandatory and of directory statutes: *De Berry v. Nicholson*, 102 N. C. 465; 11 Am. St. Rep. 707, and note; also, *State v. Russell*, 34 Neb. 116; 33 Am. St. Rep. 625, and note.

MUNICIPAL CORPORATIONS—OFFICERS—APPOINTMENT OF.—The power to appoint or elect to office does not necessarily belong to either the legislative, executive, or judicial departments. It is commonly exercised by the people, but the legislature may, as the law-making power, when not restricted by the constitution, provide for its exercise by either department of the government, or by any person or association of persons which it may choose to designate for that purpose. The function is legislative, executive, or judicial when the law has confided its exercise to the legislative, executive, or judicial department of the government: *Fox v. McDonald*, 101 Ala. 51; 46 Am. St. Rep. 98, and note; *State v. George*, 22 Or. 142; 29 Am. St. Rep. 586, and note.

BROWN v. SEATTLE.

[16 WASHINGTON, 462.]

MUNICIPAL CORPORATIONS—CONTRACTOR, LIABILITY FOR ACTS OF.—A city is answerable for the negligence of a contractor working upon the public streets if, by its charter and the terms of the contract, the work is practically under the control and management of its engineer, and it has the right not only to control the work, but to discharge all persons employed thereon who neglect or refuse to obey the engineer in charge.

INDEPENDENT CONTRACTOR, WHO IS NOT.—Persons contracting to do work on the public streets of a city are not independent contractors if, by the law and terms of their contract, the municipality has through its officers the right to control the work and to discharge all persons employed thereon who neglect or refuse to obey its engineer in charge.

John K. Brown and F. B. Tipton, for the appellant.

Blaine & De Vries, for the respondents.

⁴⁶³ GORDON, J. The appellant entered into a contract with Spurr & Wilmot to improve and pave a certain street in the city of Seattle. While engaged in that work the contractors excavated under a certain water main, removed the earth from around it, and thereafter filled up the excavation. As a result of such

excavation and removal of the earth which supported it, the main burst, causing water therefrom to flow into the cellar of respondents, damaging their goods. This action was brought to recover from the city the damages so sustained. There was a verdict and judgment for the respondents, from which the city has appealed.

The only question which we need to consider is whether Spurr & Wilmot were independent contractors for whose negligence the appellant is not responsible. The charter of the city of Seattle, amended March 8, 1892, and in force at the time when the contract in question was entered into, conferred upon the board of public works the management and control of public streets and alleys of the city; also the superintendence of streets, making the improvements therein, and the management, building, and repairing of all sewers and connections therewith. It further provides that such improvements as are made by contractors shall be made under the management of the board of public works. The contract and specifications in the case under consideration contained numerous provisions requiring the material used for the work to be of the kind and dimensions designated by the city engineer; also that the general plan should be subject to "such ⁴⁶⁴ changes or additional plans or instructions as the city engineer might require, . . . before the beginning or during the progress of the work." The contract also contained the following stipulations:

"Plans and superintendence.—This improvement shall be under the superintendence of the city engineer, and any orders or directions given by him or his duly appointed representative shall be respected and immediately and strictly obeyed by the contractor or any overseer in charge of the work. It is hereby understood that wherever the term 'engineer' or city engineer are mentioned in these specifications, it shall mean himself or any representative duly appointed by him."

"General stipulations.—Whenever the contractor is not present on the work, orders will be given to the superintendent or overseer who may have immediate charge thereof, and shall by them be received and strictly obeyed. And if any person employed on the work shall refuse or neglect to obey the directions of the city engineer or board of public works in anything relating to the work, or shall appear to be incompetent, disorderly, or unfaithful, he shall, upon the requisition of the engineer, be at once discharged, and not again employed upon any part of the work."

There was also a provision requiring the contractors to save the city harmless from suits brought against it by reason of the negligent performance of the work.

We think, that, under the provisions of this contract, which practically placed the work under the control, direction, and management of its engineer, Spurr & Wilmot did not become independent contractors within the meaning of the rule which exempts a city or other employer from liability for an injury caused by negligence in the prosecution of the work. Under the contract, the city retained the right to direct ⁴⁰⁵ and control the work, and to discharge all persons employed thereon who should neglect or refuse to obey its engineer in charge.

The cases of *Pack v. Mayor*, 8 N. Y. 222, *Blake v. Ferris*, 5 N. Y. 48, 55 Am. Dec. 304, and the other cases cited by counsel did not contain provisions of the character noticed in the present contract, and we think those cases do not conflict with the conclusion at which we have arrived in the present case: See, also, *Seattle v. Buzby*, 2 Wash. Ter. 25; *Fink v. St. Louis*, 71 Mo. 52; *Cincinnati v. Stone*, 5 Ohio St. 38.

Affirmed.

Scott, C. J., and Dunbar, Anders, and Reavis, JJ., concur.

MUNICIPAL CORPORATIONS—LIABILITY FOR ACTS OF CONTRACTORS.—Upon this general subject see the monographic note to *Goddard v. Harpswell*, 30 Am. St. Rep. 411, and extended note to *Farquar v. Roseburg*, 17 Am. St. Rep. 735-737.

MASTER AND SERVANT—INDEPENDENT CONTRACTORS—WHO ARE.—Contractors who have agreed to erect a building, of certain materials, and according to fixed plans and specifications, are independent contractors, though the work is to be performed under the inspection, and to the satisfaction of architects acting as agents of the owner: *Smith v. Milwaukee* etc. Exchange, 91 Wis. 360; 51 Am. St. Rep. 912, and extended note. An independent contractor is one who, exercising independent employment, contracts to do a piece of work according to his own methods, and without being subject to control of his employer except as to the result of his work: *Powell v. Construction Co.*, 88 Tenn. 692; 17 Am. St. Rep. 925.

LOWRY v. MOORE.

[16 WASHINGTON, 476.]

IN PLEADING THE STATUTE LAW OF ANOTHER STATE, it is not sufficient to allege that the laws of such state are of a certain effect, or that by them certain things are required, but the statute intended to be relied upon should be pleaded as would any other fact. not by stating what in the opinion of the pleader is its effect, but the statute itself should be set forth.

PRACTICE—JUDGMENT, ENTRY OF FOR EVASIVE ANSWERS TO INTERROGATORIES.—If a defendant is served with interrogatories in writing requiring him to state whether he was acquainted with the payee of the note sued upon, and whether he had ever signed or executed such note, and, if so, what was its consideration, and whether it was unpaid, to all of which he answered that he does not know, such answer may be stricken out, and a judgment given for the plaintiff on the ground that the answers are evasive, sham, impertinent, and made to conceal, instead of disclosing, the facts within the defendant's knowledge.

Condon & Wright and William H. Moore, for the appellant.

Isaac D. McCutcheon, for the respondent.

⁴⁷⁶ GORDON, J. Respondent brought this action to recover upon a promissory note. The complaint contains the usual allegations. The answer of defendant contained general denials of the allegations of the complaint, and, as an affirmative defense set forth that the note in suit was executed, delivered, and made payable in the state of Kentucky, that at the time it became due, the defendant and the payee of ⁴⁷⁷ the note were nonresidents of the state of Washington, and resided in the state of Kentucky. The answer then alleges that actions upon promissory notes like the one in question are required by the law of the state of Kentucky to be brought within five years, that according to the laws of Kentucky, where a cause of action accrues in that state against a resident thereof, and after such cause of action accrues, the defendant shall depart from and reside out of the state, the time of his absence therefrom shall be deemed and taken as a part of the time limited for the commencement of such action. It is also alleged in said answer that the cause of action did not accrue within five years before the commencement of such action.

The respondent demurred to the affirmative defense, and his demurrer was sustained, and thereupon the appellant served written notice of his election to stand upon his affirmative defense and refused to amend. Thereafter respondent served written interrogatories upon the appellant pursuant to statute, which interrogatories and the answers of the appellant thereto are as follows:

"1. Q. Were you ever acquainted with Henry M. Lowry, the payee of the note on which this action is based, and with C. B. Lowry, the assignee of said note, or either of them? A. I do not know that I was ever acquainted with Henry M. Lowry, the payee of the note on which this action is based, or with C. B. Lowry, said to be the assignee of said note, or with either of them.

"2. Q. If so, state where you knew them, and how long you knew them or either of them. A. I once knew an Henry M. Lowry, who lived in the state of Kentucky, and a C. B. Lowry who also lived in the same state; I knew them for a number of years.

"3. Q. State whether you ever saw the note on which this action is based, and at what times and ⁴⁷⁸ places and under what circumstances. A. I do not know.

"4. Q. Did you execute and deliver that note? A. I do not know.

"5. Q. If so, what was the consideration therefor? A. I do not know.

"6. Q. Do you know the signature of Henry M. Lowry, the payee of said note? A. I do not know.

"7. Q. Have you not, prior to the commencement of this action had this note presented to you, and did you not examine it together with the indorsement thereon? A. I do not know.

"8. Q. If so, state whether the signature subscribed to the assignment thereon is the signature of the said H. M. Lowry, the payee? A. I do not know.

"9. Q. Has any demand been made upon you for the payment of said note, prior to the commencement of this action, and if so, by whom, and in what capacity? A. I do not know.

"10. Q. Has the said note or any part thereof ever been paid by you to any one? A. I do not know."

Subsequently, the respondent moved the court to strike the answers to said interrogatories, and for judgment, for the reason, among others, that the answers to all of them are "evasive, sham, and impertinent, and made with intent to conceal instead of disclosing the facts, within his own knowledge, sought to be elicited by the several interrogatories." This motion was sustained and judgment entered. The appeal is from the judgment, and brings with it for review in this court the ruling of the superior court sustaining the demurrer to the so-called affirmative defense. The objection urged by respondent to the sufficiency of the pleading is, that the statute law of the state of Kentucky is not set forth in terms in the answer, and that in this respect the pleader has

merely given his own conclusion or interpretation of the statute, and of the interpretation which the courts of that state have ⁴⁷⁰ placed upon it. We think the demurrer was properly sustained. We think that, in the absence of statutory provisions to the contrary, the settled rule is, that where a party relies upon the statute of a sister state, he must plead it as he would any other fact, not by stating what in the opinion of the pleader is its effect, but the statute itself should be set forth: *Carey v. Cincinnati etc. R. R. Co.*, 5 Iowa, 357; *McLeod v. Connecticut etc. R. R. Co.*, 58 Vt. 727; *Sells v. Haggard*, 21 Neb. 357; *Bank of Commerce v. Fuqua*, 11 Mont. 285; 28 Am. St. Rep. 461; *Swank v. Hufnagle*, 111 Ind. 453.

"They, or such parts of them as are necessary to be understood, must be set out in the pleadings, and proved like other facts": Bliss on Code Pleading, sec. 183.

Nor do we think that the court erred in striking the answers of the appellant to the interrogatories propounded and rendering judgment. The interrogatories were directed to facts which were within the knowledge of the appellant, and respondent was entitled to have them fairly and fully answered. Appellant cannot sustain these answers upon the theory that he did not know what note respondent was suing upon. A full description of it is set forth in the complaint, and it was the note so described to which the interrogatories were directed.

Perceiving no error in the record, the judgment is affirmed.

Dunbar and Reavis, JJ., concur.

EVIDENCE — STATUTES OF ANOTHER STATE — HOW PROVEN.—The statutes of another state must be pleaded and proved as any other fact. The courts will not take judicial notice of them: *Schultz v. Howard*, 63 Minn. 196; 56 Am. St. Rep. 470, and note; *Hancock Nat. Bank v. Ellis*, 166 Mass. 414; 55 Am. St. Rep. 414, and note.

RAUCH v. CHAPMAN.

[16 WASHINGTON, 568.]

MUNICIPAL CORPORATIONS — INDEBTEDNESS, PROVISIONS AGAINST CREATING DO NOT INCLUDE COMPULSORY OBLIGATIONS.—A constitutional provision declaring that no county, city, school district, or other municipal corporation shall become indebted in any amount exceeding a sum specified, does not apply as against obligations imposed by the constitution and laws of the state. Hence, warrants are not invalid, though issued after the county indebtedness has reached the constitutional limit, if they were issued for the services of jurors in criminal proceedings, or for expenses in serving criminal process, or for expenses of a general state election, or for any other expense, the duty of meeting which has, by the constitution and laws of the state, been imposed upon such municipality.

COUNTY INDEBTEDNESS, PRIORITY BETWEEN COMPULSORY AND NONCOMPULSORY.—The liability of a county for expenditures made mandatory by the constitution and laws of the state and which must, of necessity, always continue, is paramount to its liability for other obligations which it might have refused to create without violating such constitution or laws.

W. B. Presby and Huntington & Wilson, for the appellant.

C. H. Spalding, for the respondent.

⁵⁶⁸ REAVIS, J. Suit in equity, by a taxpayer of Klickitat county, against the county treasurer to enjoin the payment of certain county warrants, on the ground ⁵⁶⁹ that they were issued after the constitutional limitation of county indebtedness had been incurred. The complaint, after other necessary allegations, set forth that the indebtedness of the county was more than one and one-half per centum of the taxable property therein, and no validation by vote of the electors had been made of any additional indebtedness. The answer stated, among other defenses to the suit, that the warrants in controversy were compulsory obligations imposed upon the county by the constitution and laws of the state, and specified some of the purposes for which the warrants were issued, among which were services for jurors in the superior court, witness fees in criminal proceedings, and sheriff's expenses in serving criminal process, and expenses incurred at the general state election. Plaintiff demurred to this affirmative defense, which demurrer was sustained by the superior court, and the court thereupon, among other facts, found the following, which are material to the consideration of the cause by this court:

"7. That the total indebtedness of said county on the ninth day of March, 1893, and during all of the time of the issue of the warrants now called was eighty-five thousand four hundred and forty-one dollars and ninety-two cents, and greatly exceeded

the constitutional limit of indebtedness for said county, after deducting therefrom the cash in the treasury and all taxes levied and uncollected.

"8. That the warrants now called by the county treasurer are the debts contracted after said ninth day of March, 1893, and were issued between the second day of April, 1893, and the twenty-sixth day of July, 1893, during all of which time said indebtedness of eighty-five thousand four hundred and forty-one dollars and ninety-two cents was outstanding, and all of said warrants now called were and are in excess of the constitutional limit of indebtedness of said county, and were issued without the assent of the voters of said county first had and ⁵⁷⁰ obtained at an election held for that purpose, and they have not been validated by any vote of the electors of said county since their issue."

Judgment was rendered against the defendant, and a permanent injunction issued against the payment of the warrants designated in the complaint. The defendant appeals.

"1. Respondent maintains here that the payment of the warrants is inhibited by section 6 of article 8 of the constitution of this state, of which the part material for consideration is as follows: "No county, city, town, school district, or other municipal corporation shall for any purpose become indebted in any manner to an amount exceeding one and one-half per centum of the taxable property in such county, etc., without the assent of three-fifths of the voters therein voting at an election for that purpose; . . . provided, that no part of the indebtedness allowed in this section shall be incurred for any purpose other than strictly county, city, town, school district, or other municipal purposes"; and with the further proviso that any city or town shall be allowed to become indebted to a larger amount, not exceeding five per centum, additional for supplying such city or town with water, light, and sewers, when the works for supplying the same shall be owned and controlled by the municipality.

It will be observed that the question involved in this cause is the construction of the above section of the constitution. Without the aid of judicial interpretation which has been placed upon this or substantially the same constitutional provision in several state constitutions we might be justified in reading the section plainly thus: "No county, etc., shall become indebted," and confine the reading to indebtedness ⁵⁷¹ incurred by the county itself. But evidently, from the conflicting adjudications that have been rendered upon this question, the language of the constitution in

this section is susceptible of more than one reading. Assuming this to be correct, we must endeavor to determine its true intent and meaning.

Judge Cooley, in his work on Constitutional Limitations, pages 57, 58, observes: "It is, therefore, a very proper rule of construction that the whole is to be examined with a view to arriving at the true intention of each part; and this Sir Edward Coke regards as the most natural and genuine method of expounding a statute. If any section of a law be intricate, obscure, or doubtful, the proper mode of discovering its true meaning is by comparing it with the other sections, and finding out the sense of one clause by the words or obvious intent of another. . . . The rule applicable here is, that effect is to be given, if possible, to the whole instrument, and to every section and clause. If different portions seem to conflict, the courts must harmonize them, if practicable, and must lean in favor of a construction which will render every word operative, rather than one which may make some words idle and nugatory. This rule is applicable with special force to written constitutions, in which the people will be presumed to have expressed themselves in careful and measured terms, corresponding with the immense importance of the powers delegated, leaving as little as possible to implication. It is scarcely conceivable that a case can arise where a court would be justified in declaring any portion of a written constitution nugatory because of ambiguity. One part may qualify another so as to restrict its operation, or apply it otherwise than the natural construction would require if it stood by itself; but one part is not to be allowed to defeat another, if by any reasonable construction the two can be made to stand together."

And again the same authority, on page 37: 572 "What is a constitution and what are its objects? . . . It is not the beginning of a community, nor the origin of private rights, it is not the fountain of law, nor the incipient state of government; it is not the cause, but the consequence, of personal and political freedom; it grants no rights to the people, but is the creature of their power, the instrument of their convenience. Designed for their protection in the enjoyment of the rights and powers which they possessed before the constitution was made, it is but the framework of the political government, and necessarily based upon the pre-existing condition of laws, rights, habits, and modes of thought. There is nothing primitive in it; it is all derived from a known source. It presupposes an organized society, law, order,

property, personal freedom, a love of political liberty, and enough of cultivated intelligence to know how to guard it against the encroachments of tyranny.' ”

When the constitution of Washington was adopted by the people of the newly-born state, the various county governments in the territory were recognized and their organizations and powers in a great measure continued. A large body of laws applicable to the new state, and which the people had for a long time been accustomed to, were found and continued in force. At this time some of the counties in the state were already indebted to an amount equal to the constitutional limitation of one and one-half per centum. The state itself inherited from its territorial form liabilities which very nearly equaled the limitation on state indebtedness prescribed in section 1 of article 8 of the constitution. The several counties, in addition to their organization for local purposes, and having conferred upon them the power to control and build county roads and bridges, erect public buildings for county purposes, and do many other things connected with the county as a corporation, also had imposed ⁵⁷⁸ upon them certain duties by the state, and became governmental agencies, in the territory comprised in the county, for the state. Section 11 of article 11 authorizes any county, city, town, or township to make and enforce within its limits all such local police, sanitary, and other regulations as are not in conflict with general laws. Section 12 of the same article provides: “The legislature shall have no power to impose taxes upon counties, . . . or upon the inhabitants or property thereof, for county . . . purposes, but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes.”

The duty has been imposed upon the several counties in this state to provide for and pay certain necessary expenses for the enforcement of the criminal laws of the state and for expenses incurred at the regular biennial state elections at which county and state officers are elected, and in carrying out other functions of the state; and also to make expenditures necessary for the existence of the county organization.

Section 8 of article 6 of the constitution provides for biennial elections. Section 5 of article 11 also provides for the election in the several counties of boards of county commissioners, sheriffs, county clerks, treasurers, prosecuting attorneys, and other county officers as public convenience may require, and devolves upon the legislature the power to prescribe their duties and fix their terms of office, and to regulate the compensation of all such offi-

cers in proportion to their duties, and that for that purpose the legislature may classify the counties by population.

A similar limitation of county indebtedness as in this state is found in a number of the constitutions of the new states, and the limitation itself is of somewhat ⁵⁷⁴ recent growth. It may well be inquired what were the conditions of counties or municipal corporations, and what was the mischief which caused the expression of these limitations in the organic laws of these states. A recurrence to the history of the times will show that many counties and municipalities had become largely indebted, beyond their capacity to pay, for public improvements of various kinds. In many of these states, for a considerable period of time, counties and municipalities aided railway building, and many of them became bankrupt by reason of the obligations and liabilities incurred in such aid of railway companies and various other public improvements which were deemed advantageous in the rapid development of the territory included within the county. Hence, another limitation upon the power of counties and other municipalities to incur indebtedness is found in these recent constitutions, which found expression in that of our state in section 7 of article 8: "No county, city, town, or other municipal corporation shall hereafter give any money or property, or loan its money or credit, to or in aid of any individual, association, company, or corporation, . . . or become directly or indirectly the owner of any stock in or bonds of any association, company, or corporation."

2. The objects of government have usually become multiplied with the development of complex and artificial conditions of society. There is much controversy at times among our statesmen as to the necessary and proper limitations upon the powers of government, both state and municipal, but all are agreed that certain necessary fundamental functions of government must always be expressed and exercised. The protection of life, liberty, and property, the conservation ⁵⁷⁵ of peace and good order in the state, cannot remain in abeyance. These functions of government are elementary and indestructible. The constitutional convention which framed, and the sovereign people who adopted, a republican form of government for the state of Washington had these known principles in mind. Section 10 of the declaration of rights prescribes: "Justice in all cases shall be administered openly and without unnecessary delay"; and in section 22 it is declared: "In criminal prosecutions the accused shall have the right to . . . have compulsory process to compel the at-

tendance of witnesses in his own behalf, have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed." Provision is also made in the constitution for the organization and maintenance of the county government, and, as we have seen, its administration is ancillary to that of the state. All these provisions of the organic law are alike declared to be mandatory. It would make these various provisions of the constitution contradictory and render some of them nugatory if a construction were placed upon the limitation of county indebtedness which would destroy the efficiency of the agencies established by the constitution to carry out the recognized and essential powers of government. It cannot be conceived that the people who framed and adopted the constitution had such consequences in view. The judicial power was vested in the courts; the law must be administered through them; the jury is an essential part of the judicial procedure; justice must be administered without unnecessary delay between the citizens of the state; persons accused of crimes must have a speedy and impartial jury trial; compulsory process must be served by the sheriff; ⁵⁷⁶ witnesses are compelled to appear. The regulation of much of this procedure, and the compensation of jurors and witnesses, as well as of officers, in the counties, is vested in legislative discretion. Section 1 of article 9 of the constitution declares: "It is the paramount duty of the state to make ample provision for the education of all children residing within its borders"; and section 2, same article: "The legislature shall provide for a general and uniform system of public schools." Our constitution seems to have added to the proper and essential functions of free government the maintenance of public schools.

3. The construction of some of the other courts of similar constitutional provisions may here be examined. In *Grant County v. Lake County*, 17 Or. 453, the court, referring to the constitution of Oregon, said: "The constitutional inhibition that no county shall create any debts or liabilities which shall, singly or in the aggregate, exceed the sum of five thousand dollars, except to suppress insurrection or repel invasion, does not imply that all debts and liabilities against a county over and above that sum are necessarily obnoxious to that provision. To justify the court in finding the said conclusion of law, it should have found that the county created the indebtedness. Counties do not create all the debts and liabilities which they are under; ordinarily, such debts and liabilities are imposed upon them by law. A county is

mainly a mere agency of the state government—a function through which the state administers its governmental affairs—and it has but little option in the creation of debts and liabilities against it. It must pay the salaries of its officers, the expenses incurred in holding courts within and for it, and various and many other expenses the law charges upon it, and which it is powerless to prevent. Debts and liabilities arising out of such matters, whatever sum they may amount ⁵⁷⁷ to, cannot in reason be said to have been created in violation of the provision of the constitution referred to, as they are really created by the general laws of the state, in the administration of its governmental affairs. Said provision of the constitution, as I view it, only applies to debts and liabilities which a county, in its corporate character, and as an artificial person, voluntarily creates.”

This decision has been followed by the same court in *Wormington v. Pierce*, 22 Or. 606, *Burnett v. Markley*, 23 Or. 436, and *Dorothy v. Pierce*, 27 Or. 373.

The supreme court of California, in *Lewis v. Widber*, 99 Cal. 412, observes: “The respondent contends . . . that he should not pay petitioner’s salary on account of section 18 of article 11 of the state constitution, which reads as follows: ‘No county, city, town, township, board of education, or school district shall incur any indebtedness or liability in any manner, or for any purpose, exceeding any year the income and revenue provided for it for such year, without the assent of two-thirds of the qualified voters,’ etc. It is quite apparent, however, that this clause of the constitution refers only to an indebtedness or liability which one of the municipal bodies mentioned has itself incurred, that is, an indebtedness which the municipality has contracted, or a liability resulting, in whole or in part, from some act or conduct of such municipality. Such is the plain meaning of the language used. The clear intent expressed in the clause was to limit and restrict the power of the municipality as to any indebtedness or liability which it has discretion to incur or not to incur. But the stated salary of a public officer fixed by statute is a matter over which the municipality has no control, and with respect to which it has no discretion; and the payment of his salary is a liability established by the legislature at the date of the creation of the office. It, therefore, is not an indebtedness or liability ⁵⁷⁸ incurred by the municipality within the meaning of said clause of the constitution.”

In Texas, the constitution requires that cities, in creating debts, shall, at the same time, make provision for the payment of the

debts by assessing and collecting a tax to pay the interest thereon and to provide a sinking fund to meet the principal. This requirement of the constitution has been held not to apply to debts created by the city for current expenses: *Terrell v. Dessaint*, 71 Tex. 770; *Biddle v. Terrell*, 82 Tex. 335.

Section 2786 of the Revised Statutes of Louisiana declares that the constituted authorities of incorporated towns and cities of the state "shall not hereafter have power to contract any debt or pecuniary liability without fully providing in the ordinance creating the debt the means of paying the principal and interest of the debt or contract." The supreme court of Louisiana, construing the inhibition in the above section upon a claim arising for payment of expenses of indigent smallpox patients, which duty was imposed on the city by the state law, says: "The debt on which this judgment is founded is for current municipal expenses; and we have held that debts for such expenses do not fall under the restrictions imposed by the statute referred to: *Laycock v. Baton Rouge*, 35 La. Ann. 479"; *State v. New Orleans*, 37 La. Ann. 13.

In *Grant v. Davenport*, 36 Iowa, 396, the supreme court of Iowa says: "our constitution declares that 'no municipal corporation shall be allowed to become indebted in any manner, or for any purpose, to an amount in the aggregate exceeding five per centum on the value of the taxable property within such corporation.' . . . The plaintiffs aver in their petition the amount of ^{the} taxable property and also the amount of the city indebtedness upon bonds executed in compromise of a previous bonded debt, and show, by express averments, that the present indebtedness of the city is in excess of the constitutional limit. The direct question is therefore presented, whether the ordinance and its acceptance, which together constitute a contract, create an indebtedness by the city, in the sense of that word as used in the constitution. And we are not, by any means, inclined to limit or restrain the meaning of the word 'indebtedness,' as there used, so as to confine it to debts evidenced by bond or to those which are due simply, but rather to give to the word its fair and legitimate meaning and general acceptance. We have heretofore recognized and adjudicated the right and duty of a city to retain and apply its current revenues to the payment of its proper and ordinary current expenses; and this too as against a judgment creditor, who demanded and insisted upon the application of such revenues to the payment of his judgment debt, then long overdue: *Coy v. Lyons*, 17 Iowa, 1; 85 Am. Dec. 539; *Coffin v.*

Davenport, 26 Iowa, 515. This right to thus apply the current revenues to the defraying of ordinary expenses is grounded upon the fact that such a course is absolutely necessary to the life of the municipality and to the successful accomplishment of the purposes of its creation. Any appropriation of these revenues, therefore, whether by ordinance or by contract, to the payment of the ordinary expenses, would be, beyond question it seems to us, both reasonable and proper": *Argenti v. San Francisco*, 16 Cal. 255; *Welch v. Strother*, 74 Cal. 413; *Smith v. Dedham*, 144 Mass. 177, which approves *Laycock v. Baton Rouge*, 35 La. Ann. 479; *Barnard v. Knox County*, 37 Fed. Rep. 563.

In *Potter v. Douglas County*, 87 Mo. 239, suit was brought to recover from the county the sum of four hundred and fifty dollars, on account of services performed by plaintiff as sheriff and jailor in keeping certain prisoners committed to jail by the court. Section 12 of article 10 of the constitution ⁵⁹⁰ of Missouri prohibited any political corporation or subdivision of the state from becoming indebted in any manner, or for any purpose, to an amount exceeding in any year the income and revenue for such year without the assent of two-thirds of the voters thereof. It was admitted that the county expenses had exceeded the income and revenue for the year and there was no assent of the voters to any increase. The supreme court of Missouri says: "The only point, then, for discussion, is the liability of defendant in such circumstances as already set forth. . . . The statute . . . makes it the duty of the sheriff or jailor of a county to receive prisoners . . . and safely keep them subject to the orders of the judge of the court for the county whence such prisoners are brought; . . . and announces a penalty for failure thus to bring the prisoners before the proper court for trial, and renders such sheriff, etc., liable for imprisonment for contempt, and also to a civil action for damages."

And another section of the statute "permits such sheriff, etc., for such failure, etc., to be removed from office and rendered incapable thereafter of holding the same." The court continues: "These sections are to be considered in connection with section 12 of article 10 of our constitution. . . . It is manifest, if that section of the constitution applies in cases of this sort, the predicament in which those counties are placed which have neither jails nor sufficient revenue is a most lamentable one, bereft, as they would be, of all means for the safekeeping of that dangerous class of persons whose violations of the law caused their arrest. . . . After carefully considering the subject, I am not of the

opinion that the constitutional prohibition should be ruled to apply in instances like the present. . . . I do not regard section 12, supra, as applying here, because the effect of such construction would be destructive of the peace ⁵⁸¹ and good order in every county embraced within the provisions of section 6090 aforesaid; for it would be an impossibility to submit to a vote of the people of the county concerned the question of an unascertained and unascertainable indebtedness to be incurred in the future, as the exigencies of the case might demand. . . . It is not to be intended that those who framed, or those who by their vote adopted, our constitution contemplated or sanctioned any such mischievous and destructive result. . . . Such a construction, destroying, as it would, the very fundamental safeguards and bulwarks of organized government and society, would be to attribute to the framers of the constitution a most palpable absurdity; and by an absurdity is meant that which is to be regarded as morally impossible, which is contrary to reason, or, in other words, which could not be attributed to men in their right senses."

4. The constitution of Colorado, section 6, article 11, provides: "No county shall contract any debt by loan in any form except for the purpose of erecting necessary public buildings, making or repairing public roads and bridges; and such indebtedness contracted in any one year shall not exceed the rates upon the taxable property in such county, following: [then specifying the counties in gradation according to the taxable property] . . . and the aggregate amount of indebtedness of any county for all purposes, exclusive of debts contracted before the adoption of this constitution, shall not at any time exceed twice the amount above herein limited, unless . . . the question of incurring such debt shall, at a general election, be submitted to such of the qualified electors," etc.

The supreme court of Colorado, construing this section of the constitution, holds that the limitation is absolute, and that no liability can be incurred thereunder by a county for any necessary governmental purpose, for expenses of courts, payment of jurors or any other purpose. The court says: ⁵⁸² "The limitation being applicable to all debts, irrespective of their form, it follows that, in determining the amount of county indebtedness at any time, county warrants are to be taken into the account, and any warrant which increases the indebtedness over and be-

yond the limit fixed is in violation of the constitutional provision, and void": *People v. May*, 9 Colo. 98.

But this construction of the constitution by the supreme court of Colorado has led, it seems, to some curious makeshifts by the legislature of that state, which have been approved by the court. Thus, in the case of *People v. May*, 9 Colo. 404, the court reaffirms that the limitation imposed upon county indebtedness by the constitution, article 11, section 6, includes liabilities contracted by the county authorities under the direct authority of the legislature, as well as those contracted by them under their general statutory power. But, besides that, "a county which has reached the constitutional limit of indebtedness may constitutionally make assignments of the annual revenue accruing from taxes levied but uncollected for the current year, provided such assignments are not in excess of the amount covered by the annual levy for the year in which such assignment is made, and the warrant or instrument of assignment is expressly made payable out of the incoming revenue for the current year, and is an assignment pro tanto without recourse by the county of such fund." And thus it will be seen that the legislature of Colorado, in acts approved by the supreme court of that state, has found a method of prolonging the life of the counties and exercising the ordinary functions of government by making an assignment of a portion of the uncollected revenue of the county for the ensuing year without recourse back upon the county.

⁵⁹³ In the case of *Rollins v. Lake County*, 34 Fed. Rep. 845, the eminent judge, Brewer, construing the above section of the Colorado constitution, differed with the supreme court of the state, and held that necessary expenditures imposed upon the county by authority of the state were not within the inhibition of the constitution. But this case, on appeal, in *Lake County v. Rollins*, 130 U. S. 662, was reversed. In this case the supreme court of the United States, speaking by Mr. Justice Lamar, says: "We cannot say, as a matter of law, that it was absurd for the framers of the constitution for this new state to plan for the establishment of its financial system on a basis that should closely approximate the basis of cash. It was a scheme favored by some of the ablest of the earlier American statesmen. Nor can the fact disclosed in the bill of exceptions, that, after the adoption of the state constitution the county officials, and many of the people, designedly or undesignedly, disregarded the constitutional rule, render the plan absurd. If it was a mistaken

scheme, if its operation has proved or shall prove to be more inconvenient than beneficial, the remedy is with the people, not with the courts."

In considering the distinguished authority which enunciated the above views, it is well to reflect that this cause came from the state of Colorado into the supreme court of the United States, and that the decision of the latter court might well be rested upon the ground that the same construction had previously been given to the constitution of Colorado by the state supreme court. It is true that many able statesmen have favored the establishment of a financial system for government upon a cash basis; but the fact that, while theoretically such a system is favored and doubtless is very desirable, it has never yet in practice ⁵⁵⁴ been done, occurs to us to be a powerful argument that practical statesmen in a constitutional convention, and the people in its adoption, would have the emergencies shown by universal history in view, rather than the disquisitions of philosophical writers upon this subject.

The supreme court of Missouri, in *Barnard v. Knox County*, 105 Mo. 382, in effect overruled the former case of *Potter v. Douglas County*, 87 Mo. 239, but evidently upon the authority of *Lake County v. Rollins*, 130 U. S. 662.

We are constrained to rule that the constitutional limitation of county indebtedness in section 6 of article 8 of our constitution does not include those necessary expenditures made mandatory in the constitution and provided for by the legislature of the state, and imposed upon the county; that the payment of these is a prior obligation, and other liabilities incurred by the county are subject and inferior to these primary obligations which must of necessity always continue.

The cause is reversed and remanded to the superior court of Klickitat county, with instructions to proceed in conformity to the views expressed in this opinion.

Scott, C. J., and Anders, Dunbar, and Gordon, JJ., concur.

MUNICIPAL CORPORATIONS — INDEBTEDNESS — PROVISIONS AGAINST CREATING.—If the constitution merely prohibits the creation of indebtedness beyond a specified amount by a county or city, the legislature is not thereby deprived of the power otherwise possessed by it of imposing a liability upon the municipality, as where it annexes thereto territory before that time forming part of another municipality, and provides that the city or county receiving such territory shall be liable for a portion of the debts of the municipality from which the territory was detached: *Monographic note to Beard v. Hopkinsville*, 44 Am. St. Rep. 234.

See, also, *McBean v. Fresno*, 112 Cal. 159; 53 Am. St. Rep. 193, and note as to what indebtedness is within a legal provision against a municipality incurring liabilities beyond a certain amount.

MUNICIPAL CORPORATIONS—INDEBTEDNESS—COMPULSORY AND NONCOMPULSORY.—As to distinctions drawn between compulsory and noncompulsory indebtedness, see the monographic note to *Beard v. Hopkinsville*, 44 Am. St. Rep. 234.

CASES

IN THE

SUPREME COURT

OF

ARKANSAS.

BANK OF LITTLE ROCK v. FRANK.

[68 ARKANSAS, 16.]

FRAUD—PROOF OF—CIRCUMSTANCES OF SUSPICION. Fraud is never presumed, but must be proved, and the burden of proving it is upon the party alleging it. Direct or positive evidence is not necessary, but it may be proved by circumstances which naturally, logically, and clearly indicate its existence. Circumstances of mere suspicion, leading to no certain result, are not sufficient to prove it.

ASSIGNMENT FOR BENEFIT OF CREDITORS—FRAUD—PROMISE OF PREFERENCE.—A fraud that will avoid an assignment for the benefit of creditors must be in the assignment itself, and, as a debtor has a right to prefer creditors, no promise made by him, in borrowing money, to prefer the lender in a deed of assignment, should he be compelled to make one, will invalidate the assignment for fraud, when made with such a preference.

ASSIGNMENT FOR BENEFIT OF CREDITORS—WAIVER OF FRAUD.—If a debtor commits a fraud in the purchase of goods, no one can take advantage of it except the creditor affected, and he waives the fraud by suing for the purchase money. Hence, all creditors who attack an assignment, made by their debtor for the benefit of creditors, as fraudulent, and who are affected by such fraud, waive it by suing for the purchase money.

ASSIGNMENT FOR BENEFIT OF CREDITORS.—FRAUD IN FACT WHICH VITIATES ASSIGNMENTS must be in the assignment itself. Hence, frauds in separate and independent transactions do not affect subsequent assignments for the benefit of creditors.

ASSIGNMENT FOR BENEFIT OF CREDITORS—PREFERENCE OF ATTORNEY, WHEN VOID.—A provision, in an assignment for the benefit of creditors, to prefer an attorney at law, in a given sum, for services to be rendered in upholding and enforcing the assignment, is fraudulent in law, and void, although a part of such amount is to pay for past services, because it deprives the assignee and the court of their discretion in determining the necessity of employing an attorney, and the amount of his compensation.

ASSIGNMENT FOR BENEFIT OF CREDITORS THOUGH VOID IN PART IS NOT VOID IN TOTO.—A whole assignment for the benefit of creditors is not made void by a preference therein which is fraudulent in law and void, where no actual fraud was intended, and the void stipulation giving such preference can be eliminated from the deed of assignment without defeating the general intent of the instrument.

Dan W. Jones & McCain, for the appellants.

Joseph Loeb, Morris M. Cohn, Marshall & Coffman, and W. E. Atkinson, for the appellees.

¹⁸ **BATTLE, J.** On the 22d of December, 1893, Joseph Rudolph, a merchant, assigned certain property to Joseph Griffith for the benefit of his creditors, directing that certain persons to whom he was indebted should be first paid. The deed evidencing the assignment was, on the same day, filed in the office of the clerk of the Pulaski chancery court; and immediately thereafter the Bank of Little Rock, one of the preferred creditors, ¹⁹ filed in said court a complaint, asking for the appointment of a receiver to take possession of the property assigned, and administer the trust created by the deed of assignment under the orders and directions of the court. In response to the complaint, Joseph Griffith, the assignee, was appointed receiver; and he took the oath, filed bond, and entered upon the discharge of the duties of his office. Then many of the unpreferred creditors of the assignor sued out orders of attachment against the property of Rudolph, and, for the purpose of subjecting it to the satisfaction of their debts, became parties to the action instituted by the Bank of Little Rock, and asked that the deed of assignment be set aside as fraudulent and void for the following reasons: 1. Because the alleged indebtedness to Charles Rudolph and Louis Rudolph, two of the creditors preferred in the deed of assignment, were simulated, fictitious, fraudulent, and void; 2. Because the assignment was a fraudulent scheme on the part of the assignor to cheat, hinder, and delay its creditors; 3. Because possession of the property so assigned was delivered to the assignee before an inventory was filed by him; 4. Because the preference of Jacob Erb (another creditor) in said assignment was fraudulent, and the amount owing to him was for future services to be rendered by him to the assignor; 5. Because the assignment was made with the fraudulent intent to violate and evade the laws of this state.

These allegations were denied. After a hearing of the evidence adduced by both parties, the chancery court found that

the assignment was fraudulent, and set it aside; and the plaintiff, and the assignee, a defendant, appealed.

The facts upon which this decree was based, as they appear in evidence, are substantially as follows: Louis, Samuel, Charles, and Joseph Rudolph are brothers. ²⁰ Charles and Louis did a mercantile business at the corner of Fourth and Main streets, in the city of Little Rock, under the firm name and style of Rudolph & Co., for about sixteen years. Joseph was their clerk for this period of time, and received from \$50 to \$100 a month for his services, except the last year, for which he was paid \$1,500. During the greater portion of the first fifteen years he received \$100 a month. At the close of the sixteen years Charles and Louis dissolved partnership, and a new firm, composed of Charles and Samuel, was formed. Joseph served them in the capacity of clerk for four years, and was paid for his services at the rate of \$100 a month. At the end of this time he commenced a mercantile business in Little Rock on his own account and in his own name. Before commencing business he went with his brother, Charles, to the office of the Bradstreet Agency, and stated to the manager that he was about commencing business, and wanted to make a statement of his financial condition, and did so; and then went to Dun's Agency, and made the same statement to its manager. In these two statements he said that he had \$5,000 in cash to commence business, and had no liabilities. These statements were made as a basis of credit, and were forwarded by the agencies to the respective offices of their companies in the large cities for the benefit of their patrons. After this he went to St. Louis and Chicago, and purchased about \$5,000 or \$6,000 in goods, merchants selling to him on the faith of his statements to the agencies. This was in August, 1892. In the spring of 1893 he purchased from the traveling agents of merchants about \$3,000 in goods, and of the same in the fall following about \$4,000 in merchandise. In the fall of 1892 and in the spring of 1893 he borrowed of his brother Louis many sums of money amounting to \$1,150, and of his brother Charles various amounts aggregating \$1,400, to pay the expenses ²¹ of his business and a part of the debts contracted by the purchase of goods in the year 1892, and executed to each of them his promissory notes for the amount borrowed. He continued in business about one and a half years, when he failed and made an assignment of property for the benefit of his creditors, preferring, among others, his brothers, Louis and Charles, as to the debts for borrowed money, and Jacob Erb, an attorney at law,

who wrote the deed of assignment, for \$200. At this time he owed between \$8,000 and \$9,000, and the assets belonging to his business and assigned amounted to about \$5,300. Between \$4,000 and \$5,000 of his indebtedness was for money borrowed, and the remainder was for goods purchased.

At the commencement of his mercantile business, he had only \$1,500 or \$1,600, and, while merchandising, sold goods at an average profit of twenty per cent. When he closed, his liabilities exceeded his assets about \$3,700. How much this difference consisted in shrinkage in the value of goods on hand, if any, does not appear.

How much his sales were, how much indebtedness he paid, what stock he had at any time, he was unable to state or even approximate, when called to testify. He kept no book of accounts, merchandise account, bill, or cash book.

He accounted for his expenditures, while he was in business on his own account, in part by testifying that his household expenses were about \$200 a month, and that the expenses of his store, such as rent, clerk hire, lights, and insurance, were about \$200 a month, and that his individual expenses exceeded \$30 a month. He paid \$2.50 a month for shaving, but no taxes. Sometimes he gambled at cards, and lost, but did not know how much.

While in business, he and his brother Louis were very intimate, Louis visiting his store about twenty ²² times a day, and he the store of S. Rudolph & Co. about four or five times daily, and sometimes at night after the close of business. After he failed Louis purchased the property assigned at a receiver's sale, and employed and made him manager of a mercantile business in which he (Louis) was engaged.

In the deed of assignment Joseph Rudolph directed his assignee to pay Jacob Erb the \$200 for which he was preferred as before stated, before paying any other creditor. This sum of money was to be paid for services to be rendered by Erb in upholding, maintaining, and enforcing the assignment, and for "legal advice" previously given. The services were to be rendered by bringing and prosecuting an action in equity for the enforcement of the trust vested in the assignee, which Erb undertook to do by bringing the action instituted in the name of the Bank of Little Rock, one of the preferred creditors, and failed to accomplish.

Do these facts sustain the finding and decree of the chancery court? Fraud is never presumed, but must be proved, and the

burden of proving it is upon the party alleging it. It need not be shown by direct or positive evidence, but may be proved by circumstances. "Slight circumstances or circumstances of an equivocal tendency, or circumstances of mere suspicion, leading to no certain results," are not sufficient evidence. "They must not be, when taken together and aggregated, when interlinked and put in proper relation to each other, consistent with an honest intent. If they are, the proof of fraud is wanting." They may be sufficient to excite suspicion, but suspicion is not the equivalent of proof. Circumstances necessary to prove fraud must be such as naturally, logically, and clearly indicate its existence: *Shultz v. Hoagland*, 85 N. Y. 464; *Burrill on Assignments*, 6th ed., sec. 311.

²³ The creditors attacking the assignment in question rely on circumstantial evidence to prove actual fraud. The facts on which they rely are, the fraternal relation existing between Louis, Charles, and Joseph, the statement of Joseph in the presence of Charles that he had \$5,000 to commence business when he had only \$1,500 or \$1,600, the financial assistance of Louis and Charles to Joseph when he was embarrassed in business and unable to meet his pecuniary obligations, and the intimacy of the brothers, as shown by their frequent visits. While conceding that a fraud that will avoid an assignment must be in the assignment itself, they insist that these facts show that they aided him in maintaining a business on a fictitious credit, "upon a secret promise of preference in case of ultimate disaster," when they knew that he was insolvent, and thereby enabled him to contract debts which he could not have made without such assistance. But these facts are not sufficient to show that the assignment was void for fraud.

There is no evidence that Charles knew that the statement made by Joseph to Bradstreets's or Dun's Agency as to his financial condition, when he was about to commence business, was false. Joseph had received a salary of Rudolph & Co. at the rate of \$100 a month for the greater part of fifteen years, and could, in that time, have saved out of his earnings the sum of \$5,000. During a part of that time he had maintained and supported himself on a salary of \$50 a month, and thereby demonstrated his ability to save the \$5,000 out of the salary he received when he was paid \$100 a month. There is no evidence that Charles knew, or had reason to believe, that he had not done so when he represented that he had the \$5,000 at the beginning of his business.

The fact that Louis and Charles loaned money to Joseph, when he was embarrassed, to pay expenses of ²⁴ his business and a part of the debts contracted by the purchase of goods on a credit, was no evidence of fraud. They had the right to do so, and did not thereby diminish his assets or his ability to pay his debts; and no circumstances connected with the loans showed any scheme or conspiracy to defraud creditors. Consequently, no promise of Joseph to prefer them, in a deed of assignment, to other creditors, made at the time the money was loaned, if there were any, could affect such an assignment; for he had the right to do so, and all his subsequent creditors permitted him to contract debts with them on that condition.

If Joseph, with or without the assistance of Louis and Charles, committed a fraud in the purchase of goods, no one can take advantage of it except the creditor affected; and he can waive the fraud, and does so by seeking to enforce the payment of the debt contracted by the purchase. The creditors who attacked the assignment in question, if affected by such a fraud, waived it by suing for the purchase money: *Bryan-Brown Shoe Co. v. Block*, 52 Ark. 458.

Frauds in separate and independent transactions do not affect subsequent assignments. The fraud in fact which vitiates assignments must be in the assignment itself. The evidence adduced at the hearing of this cause was insufficient to prove such a fraud.

Appellees contend that the preference of Erb was fraudulent, because the \$200 for which he was preferred was to be paid him, in part, for services to be rendered thereafter, and for that reason the assignment is void. That is partially true. The assignor assumed the authority to provide for the enforcement of the trust with which the assignee was charged by employing Erb ²⁵ to uphold and enforce the assignment and fixing his compensation. It was the duty of the assignee to execute the power vested in him, and, if need be, employ counsel to aid him in so doing, and allow him compensation therefor, subject to the approval of the court having the supervision of his expenditures; such allowance being in the discretion of the court and within its power to reduce if, in its opinion, it was excessive. This authority the assignor attempted to take from the control, discretion or supervision of the assignee and the court by the employment of Erb; and the amount allowed for this compensation, which should have been appropriated by the assignee to the payment of the expenses of executing the trust, or of cred-

itors, was misapplied. This he had no right to do; and the preference is illegal and void.

But did the preference of Erb render the whole assignment void? Upon such questions there is a contrariety of opinion. In *Mead v. Phillips*, 1 Sand. Ch. 83, 85, and *Nichols v. McEwen*, 17 N. Y. 22, provisions for the payment of attorney's fees for services to be rendered after the execution of the deed of assignments were held to be for the benefit of the assignors, and, therefore, illegal and fraudulent; and that they rendered the whole assignment void, a New York statute making all assignments in trust "for the use of the person making the same," void as against creditors.

In *re Gordon*, 3 N. Y. Supp. 589, 591, decided by the supreme court, it was held that "a transfer of property by an insolvent, in trust to secure the payment for such services as may be thereafter rendered, but which the person for whose benefit the transfer is made is under no present legal obligation to render, is void as against the creditors of the assignor," the court saying: "The appellants assert that the transfer, being invalid in part, is wholly invalid. Such is the rule when the ^{2d} security is taken with a fraudulent intent—when there is a fraud in fact; but in this case it is found that 'said assignment was made in good faith, without any intention of hindering, delaying, or defrauding the creditors of the said William and Robert Gordon, Jr.'"

In *Norton v. Matthews* (1895), 28 N. Y. Supp. 265, 11 Misc. Rep. 711, decided by a superior court, it was held that where there is "a direction to pay counsel fees for services to be rendered after the transfer, the assignment is, as a consequence, made void."

In *Selleck v. Pollock*, 69 Miss. 870, Mr. Justice Campbell, in delivering the opinion of the court, said: "The instrument [deed of assignment for the benefit of creditors] is assailed as providing for the payment of counsel for future services to the assignor personally. It is defended on the ground that the provision for counsel fees had reference only to the maintaining the assignment, and this is probably the true view of the facts. The fee was not wholly for past services, or services then completed. . . . We are satisfied that no wrong was intended by any of the parties, and that they did only what they thought was proper, and that they had the right to do. The question is, Did they have the right to do what they did? By the provision for payment of \$1,500 for counsel fees, that sum was absolutely withdrawn from creditors, and devoted to the payment of the

attorney. It was to be paid at all events, whether he was called on for any future services or not. It is a fixed sum, not dependent on any part of it being earned hereafter, and payable as if past due. . . . It must be regarded as the parties regarded it, as binding the attorney to render any future service which might be required, not by the assignee (for the attorney told him he was not to serve him) but by the assignors, in case any question was raised as to their honesty and good faith in the transaction. Assuming, ²⁷ as we do, that this was to uphold and maintain the assignment, by vindicating the good faith of the assignors, and thus inure to the assignee, whose duty it was to defend the assignment, and whose title depended on the good faith of the assignors, we must pronounce the stipulation inadmissible and vicious to the extent of invalidating the assignment."

In *Drucker v. Wellhouse*, 82 Ga. 129, Chief Justice Bleckley, speaking for the court, in discussing the validity of an assignment, said: "The other ground taken and discussed is that one of the preferred debts is a due note, payable to the attorney who drafted the assignment, and was given to him by the firm for services rendered in drawing the assignment, and counsel in reference thereto, and services hereafter to be rendered, for the purpose of protecting and upholding the instrument. . . . Whether this debt in full will be a charge upon the assets must depend upon the facts extrinsic to the assignment. That it is fraudulent does not follow, as a matter of inference, from anything which we observe in the record before us. If no actual fraud was intended, but the amount of the note is more than the services rendered and to be rendered are worth, or if the assignee should not choose to employ the attorney as his counsel in behalf of creditors, or should not need professional services at all in their behalf, a proper deduction from the amount of the note can be made, and no injustice follow, either to the attorney or the other creditors. We do not recognize the right of the assignor to dictate to the assignee, either as to the attorney he should employ or the amount of compensation; but, even if an attempt to do so has been made, it may have been an innocent mistake on the part of all concerned in it, and in that event it should not operate, and could not operate, to defeat the assignment per se."

²⁸ The effect of fraud in fact and of constructive fraud upon deeds affected by them is not the same. If a deed be fraudulent in fact as to any of its parts, it is void in toto, because the statute declares it to be void in such cases: *Crawford v. Neal*, 144 U. S.

598. But it is different when the deed is only constructively fraudulent as to a part of its provisions. In that case, as a general rule, where that which is valid can be separated from that which is not, without defeating the general intent, the instrument may be sustained as to that which is legal: *Peters v. Bain*, 133 U. S. 688; *Denny v. Bennett*, 128 U. S. 489, 496; *Cunningham v. Norton*, 125 U. S. 77; *Muller v. Norton*, 132 U. S. 501; *Darling v. Rogers*, 22 Wend. 483; *Howell v. Edgar*, 3 Scam. 417, 419; *Burrill on Assignments*, 6th ed., secs. 293, 321.

But this is said in some cases not to be true of preferential assignments, containing void provisions for payments for future services. But it may have been so held because of decisions in which the services to be rendered were held to be for the benefit of the assignor, as in *Mead v. Phillips*, 1 Sand. Ch. 83, *Nichols v. McEwen*, 17 N. Y. 22, and *Selleck v. Pollock*, 69 Miss. 870. In such cases the provisions, like all stipulations in deeds of assignments for the benefit or use of the assignor, could have no motive as to creditors except a fraudulent one, and were void for actual fraud: *Bump on Fraudulent Conveyances*, 4th ed., sec. 377, and *Wait on Fraudulent Conveyances*, 2d ed., sec. 326. But be that as it may, we can see no sufficient reason for holding a whole assignment void for stipulations for such services, on account of constructive fraud, when the assignor was not to be benefited by them, when there was no violation of a statute, and they can be eliminated without defeating the general intent of the instrument, and it can be carried into effect without them. In *Lund v. Fletcher*, 39 Ark. 325, 43 Am. Rep. 270, a mortgage to secure a debt was held void as to the parts of it which were²⁰ constructively fraudulent, and valid as to the remainder. There is no difference in principle between that case and the one last supposed, and none should be made.

In the deed of assignment executed by Joseph Rudolph, the amount to be paid to Erb for future services was not for the benefit of the assignor. They were to be rendered unconditionally, and the creditors to be paid were to be the recipients of their fruit. The assignor could not have received any benefit from them other than the payment of his debts so far as the assets extended, a benefit received from payments in discharge of any debt. If the preference had been legal, and Erb had failed to perform the services, there would have been a partial failure of the consideration of the stipulation therefor, and he would not have been entitled to compensation for them, and the

amount intended therefor would have been disposed of according to the other provisions of the assignment and held for the benefit of the assignor.

The preference of Erb does not affect the general intent of the assignment. It was not intended to be a condition to the other terms of that instrument, but only an inducement to Erb to uphold and maintain the same. It was only intended to be a means of accomplishing the intention of the assignor, and can be eliminated from the deed without changing or defeating its design, and therefore does not render the whole assignment void.

The decree of the chancery court is, therefore, reversed; and the cause is remanded with directions to the court to enter a decree in accordance with this opinion, and for other proceedings.

Wood and Riddick, JJ., dissent as to conclusion from facts as to actual fraud.

When an Assignment for the Benefit of Creditors is Deemed Fraudulent, and the Effect of the Fraud on the Assignment.*

Assignments Void on Their Face Generally.—"The great and indispensable requisite in all voluntary assignments by debtors is good faith; the great and fatal objection is fraud, or the intent to defraud creditors. It is not enough that an assignment be for a valuable consideration. It must be bona fide also": Wright v. Lee, 2 S. Dak. 596, 624. An assignment for the benefit of creditors may be void because it does not comply with the statutory requirements in relation to making a valid assignment; as where no inventory is made and filed within the time prescribed: Connor v. Omaha Nat. Bank, 42 Neb. 602; or where the oath required is not made: Williams v. Crocker, 36 Fla. 61; or where the assignor's right of redemption in certain premises, conveyed for the security of a debt, is omitted from the schedule: McMillan v. Knapp, 76 Ga. 171; 2 Am. St. Rep. 29; or where the statutory certificate, that the copy of the assignment filed as prescribed by statute is a true and correct copy of the original, has not been indorsed or written on the copy of the assignment: Grever v. Culver, 84 Wis. 293; or where omitted creditors, whose debts are secured by collaterals, or otherwise, are excluded from the benefits of the assignment; or where no definite time is fixed within which such omitted creditors must file their claims: Bickham v. Lake, 51 Fed. Rep. 892; or where the deed of assignment is not witnessed: Sager v. Summers, 49 Neb. 459; or not acknowledged and recorded: Seal v. Duffy, 4 Pa. St. 274; 45 Am. Dec. 691; Wright v. Lee, 2 S. Dak. 596, 625; Cannon v. Deming, 3 S. Dak. 421; but this

* REFERENCE TO MONOGRAPHIC NOTES.

Creditor's attack on conveyance as fraudulent: 13 Am. Dec. 621-626.

Preferences to creditors: 26 Am. Dec. 534-537; 29 Am. Dec. 110, 111.

Proof of fraud, what sufficient: 65 Am. Dec. 157-164.

Extraterritorial effect of assignments for benefit of creditors: 78 Am. Dec. 594-597.

Assignment for benefit of creditors—lawful and unlawful preferences: 34 Am. St. Rep. 356-357.

would not necessarily make it fraudulent. If, however, there is any apparent fraudulent intent of the assignor coupled with an act or omission in contravention of the statute governing assignments for the benefit of creditors, the assignment is void on its face and will be so declared. The intent of the grantor is the principal inquiry in such assignments, and if it appears from the instrument itself, or the pleadings, that the intent is such as is prohibited by statute, the assignment is void, and precludes the necessity of examining into facts aliunde by the jury. This intent may appear from the instrument in various ways, as, by providing that goods or property may be sold on credit, that the debtor reserves a part for his own use, when required to assign the whole, or requiring the creditors to discharge their debts in full, as a condition of sharing in the benefits of the conveyance, or by showing, in the pleadings, that the grantor had more than sufficient property, at the time of the assignment, for the payment of all of his debts: *Burt v. McKinstry*, 4 Minn. 204; 77 Am. Dec. 507. An assignment of property, not made in conformity with the statute, and imposing upon creditors terms not contained therein and at variance therewith, is fraudulent in law: *Knight v. Packer*, 12 N. J. L., 214; 72 Am. Dec. 388. Statutory provisions prescribing formalities to be observed in making assignments for the benefit of creditors are mandatory: *Grever v. Culver*, 84 Wis. 295, 298; and an intention to defraud, in any material matter whatever, will always vitiate the assignment: *Wood v. Haynes*, 92 Ga. 180, 186. With respect to the omission of assets from the schedule, the question in each particular case should be determined with reference to the number, materiality, and importance of the omissions, and whether they were made by oversight and inadvertence, or deliberately and with intention to defraud: *Turnipseed v. Schaefer*, 76 Ga. 109; 2 Am. St. Rep. 17; *Albany etc. Steel Co. v. Southern etc. Works*, 76 Ga. 185; 2 Am. St. Rep. 26; *Wood v. Haynes*, 92 Ga. 180. An omission of assets amounting to three thousand dollars is enough to vitiate an assignment, under a law requiring the schedules to be "full" and "complete": *Turnipseed v. Schaefer*, 76 Ga. 109; 2 Am. St. Rep. 17; *Albany etc. Steel Co. v. Southern etc. Works*, 76 Ga. 185; 2 Am. St. Rep. 26. An assignment for the benefit of certain preferred creditors made without presenting a petition to any court or judge, without any schedule of debts or creditors, without the sentence of any court sanctioning the cession or surrender, and without any citation of creditors, is fraudulent in law as to creditors: *Leitensdorfer v. Webb*, 1 N. Mex. 34.

An assignment not executed in accordance with the assignment laws of the state, is a fraud upon creditors: *Box v. Goodbar*, 54 Ark. 6. A deed of assignment which gives immediate possession of the property to the assignee before his bond is filed is, upon its face, fraudulent in law and void as to creditors: *Lincoln v. Field*, 54 Ark. 471, 475. So, if it contains a stipulation for the continuation of the business, not for the benefit of the creditors, but for the benefit of the debtor: *Lowenstein v. Love*, 16 Lea, 658. It is also fraudulent and void where it provides for the payment of fictitious or simulated debts: *Bickham v. Lake*, 51 Fed. Rep. 892. Unsecured cred-

itors are entitled to their debtor's equity of redemption, and if the latter's deed of assignment, by its terms, so covers up and screens such equity as to obstruct access to it by the unsecured creditors, the whole assignment is fraudulent: *Chafee v. Blatchford*, 6 Mackey, 459.

As an assignment for the benefit of creditors executed in violation of the statute governing assignments, or contrary to its provisions, must fail (*Stout v. Watson*, 19 Or. 251, 257), an assignment not made for the benefit of all the creditors, as required by statute, is of no validity: *Stout v. Watson*, 19 Or. 251; *Clafin v. Iseman*, 23 S. C. 416. Even in the absence of statute, such an assignment is void: *Goddard v. Hapland*, 25 Vt. 351; 60 Am. Dec. 272. An assignment for the benefit of creditors is both fraudulent and void unless it includes all of the debtor's property: *Younger v. Massey*, 39 S. C. 115. So, where it is made with the confessed purpose of forcing a compromise with creditors: *Backhaus v. Sleeper*, 66 Wis. 68, 78; or where it contains fraudulent conditions: *Keevil v. Donaldson*, 20 Kan. 165, 168. Under the law of Connecticut, if an assignment, intended for the benefit of all the creditors, places the entire estate of the debtor beyond the reach of nonassenting creditors, in the hands of a trustee, who is empowered and directed to carry on an extensive and hazardous manufacturing business for an indefinite period, thus subjecting the property of the nonassenting creditors to the hazards and uncertainties of such business, the conveyance will be held fraudulent in law, as against nonassenting creditors, so far as the assignment attempts to convey lands in that state: *Stafford Nat. Bank v. Sprague*, 17 Fed. Rep. 784. A general assignment, in trust for the payment of creditors, by the directors of a corporation of all its property, is fraudulent and void as against the stockholders not consenting thereto, whether the company is solvent or not; and any stockholder thus defrauded may bring an action in his own name to have the assignment set aside: *Smith v. New York etc. Stage Co.*, 18 Abb. Pr. 419.

Sales on Credit.—An assignment for the benefit of creditors sometimes gives the assignee power to sell on credit, and the authorities are divided upon the proposition as to whether such a provision renders the assignment fraudulent and void upon its face. It is unquestionable that a debtor cannot, by an assignment, avoid the obligation of immediate payment when a debt is due; nor can he, without the consent of the creditor, extend the period of credit. Hence, any provision in an assignment from which it appears that the debtor, at the time of its execution, intended to prevent the immediate application of his property to the payment of his debts, will make the instrument fraudulent and void as to creditors who are hindered or delayed: *McCleery v. Allen*, 7 Neb. 21; 29 Am. Rep. 377. A provision, in a deed of trust executed by an insolvent, or in an assignment for the benefit of creditors, authorizing a sale on credit, has been held to have the effect, necessarily, to hinder, delay, or defraud creditors; and, as an intent to hinder and delay creditors, by an assignment for the benefit of creditors, renders it fraudulent and void, it is held, in many cases, that an assignment for the benefit of creditors, giving

the assignee discretionary power to sell on credit, is, upon its face, fraudulent and void, as to creditors not consenting thereto, because it tends to delay creditors by embarrassing their right to have an immediate conversion of the property into cash: *Nicholson v. Leavitt*, 6 N. Y. 510; 57 Am. Dec. 400, and note; *Porter v. Williams*, 9 N. Y. 142; 59 Am. Dec. 519; *Gates v. Andrews*, 37 N. Y. 657; 97 Am. Dec. 764; *Hutchinson v. Lord*, 1 Wis. 286; 60 Am. Dec. 381; *Truitt v. Caldwell*, 3 Minn. 364; 74 Am. Dec. 764; *Bens v. Shaughnessy*, 2 Utah, 492; *Keevil v. Donaldson*, 20 Kan. 165; *Jaffray v. McGehee*, 107 U. S. 361; *Kansas City Packing Co. v. Hoover*, 1 App. (D. C.) 268; *Catt v. Knabe etc. Mfg. Co.*, 93 Va. 736; *McCleery v. Allen*, 7 Neb. 21; 29 Am. Rep. 377; *Keep v. Sanderson*, 2 Wis. 42; 60 Am. Dec. 404; *Rosenstein v. Coleman*, 18 Mont. 459.

Thus, permission "to dispose of property in ordinary course of business" authorizes a sale on credit and renders an assignment for the benefit of creditors fraudulent and void: *Truitt v. Caldwell*, 3 Minn. 364; 74 Am. Dec. 764. So, a deed of trust assigning property for a certain class of creditors, and giving the assignee and certain creditors the right to determine the "times, places, and terms" of sale, authorizes a sale on credit, and is fraudulent and void as to any creditor objecting to the good faith and validity of the assignment: *Bens v. Shaughnessy*, 2 Utah, 492. For conditions which do not show an authority to sell on credit, see *Nye v. Van Huse*, 6 Mich. 829; 74 Am. Dec. 690; *Bagley v. Bowe*, 105 N. Y. 171; 59 Am. Rep. 488.

A power given to assignees, for the benefit of creditors, to sell on credit, is presumptive evidence of fraudulent intent to hinder and delay creditors: *Billings v. Billings*, 2 Cal. 107; 56 Am. Dec. 319. Whatever may be fairly implied from the terms or language on an instrument, such as an assignment for the benefit of creditors, is, in judgment of law, contained in it: *Hutchinson v. Lord*, 1 Wis. 286; 60 Am. Dec. 381. If the apparent effect of an assignment is to hinder or delay creditors, beyond the necessary delay incident to all valid assignments, it is void as against creditors, whatever may have been the intent of the assignor: *Kansas City Packing Co. v. Hoover*, 1 App. (D. C.) 268. A statute making the question of fraudulent intent, in all conveyances, one of fact and not of law, does not preclude the court from adjudging fraudulent an assignment which on its face permits the assignee to sell on credit, because an intention to hinder, delay, and defraud creditors is a necessary legal inference from a provision permitting sales on credit, and is as conclusive upon the assignor as if he had, in express terms, admitted a fraudulent intent: *Rosenstein v. Coleman*, 18 Mont. 459.

On the other hand, some authorities hold that a provision authorizing an assignee for the benefit of creditors to sell on credit does not of itself invalidate the assignment: *Moody v. Carroll*, 71 Tex. 143; 10 Am. St. Rep. 734; *Brahmstadt v. McWhirter*, 9 Neb. 6; 31 Am. Rep. 396, and note; *Baldwin v. Peet*, 22 Tex. 708; 75 Am. Dec. 806; *Richardson v. Marqueeze*, 59 Miss. 80; 42 Am. Rep. 353; *Bobbitt v. Rodwell*, 105 N. C. 236; *Stoneburner v. Jeffreys*, 116 N. C. 78; that it is but a badge of fraud, at most: *Elcks v. Copeland*, 53 Tex. 581; 37 Am. Rep. 760; that a trustee for the benefit of creditors may exer-

cise a sound discretion in disposing of the debtor's property, and need not always sell immediately and for cash: *Inloes v. American Ex. Bank*, 11 Md. 173; 69 Am. Dec. 190; and that a deed of trust for the payment of debts of the grantor's creditors, which impliedly authorizes the trustees to sell on such reasonable credit as may be found "expedient and beneficial to the creditors," is not fraudulent or void: *Hoffman v. Mackall*, 5 Ohio St. 124; 64 Am. Dec. 637. As to what is not to be construed into a discretionary authority to sell on credit, see *Muller v. Norton*, 132 U. S. 501; *Brahmstadt v. McWhirter*, 9 Neb. 6; 31 Am. Rep. 396; *Lord v. Devendorf*, 54 Wis. 491; 41 Am. Rep. 58; *Dorr v. Schmidt*, 38 Fla. 354. It is held in *Bobbitt v. Rodwell*, 105 N. C. 236, 244, that if a deed of trust for the benefit of creditors contains no provision as to the terms of sale, or allows the trustee to sell on credit generally, without providing for unreasonable delay, or specifying the length of credit to be given, it is not fraudulent in law, that there is no presumption of fraud for that reason, and that such general power to give credit is perfectly consistent with good faith, and falls so far short of raising a presumption of fraud that it cannot be considered as even a badge of fraud.

Illegal Reservations.—A voluntary assignment for the benefit of creditors which reserves to the assignor any interest, benefit, or advantage, out of the property conveyed, to the exclusion or injury of creditors, is fraudulent and void on its face: *Kayser v. Heavenrich*, 5 Kan. 324; *Clafin v. Iseman*, 23 S. C. 416; *Chafee v. Blatchford*, 6 Mackey, 459; *Ware v. Wanless*, 2 Wyo. 144; *Lawrence v. Norton*, 15 Fed. Rep. 853; *Muller v. Norton*, 19 Fed. Rep. 719; *Stadler v. Carroll*, 19 Fed. Rep. 721; *Bailey v. Mills*, 27 Tex. 434; note to *Turnipseed v. Schaefer*, 2 Am. St. Rep. 24; *Baldwin v. Peet*, 22 Tex. 708; 75 Am. Dec. 806; *Linn v. Wright*, 18 Tex. 317; 70 Am. Dec. 232; *Pike v. Bacon*, 21 Me. 280; 38 Am. Dec. 259; *Anderson v. Fuller*, 1 McMull. Eq. 27; 36 Am. Dec. 290; *McClurg v. Lecky*, 8 Penn. & W. 83; 23 Am. Dec. 64; *Doremus v. Lewis*, 8 Barb. 124, 128; *Curtis v. Leavitt*, 15 N. Y. 9, 116; *Kuydendall v. McDonald*, 15 Mo. 416; 57 Am. Dec. 212; *Austin v. Bell*, 20 Johns. 442; 11 Am. Dec. 297.

Thus a reservation of surplus to the injury of creditors renders the deed of assignment fraudulent in law and void: *Grimshaw v. Walker*, 12 Ala. 101; *McReynolds v. Dedman*, 47 Ark. 347; *Truitt v. Caldwell*, 3 Minn. 364; 74 Am. Dec. 764. But while an assignment or conveyance by an insolvent of all his property to one or more creditors, leaving others unprovided for, with a trust to return to the debtor the surplus remaining after paying such creditor or creditors, is fraudulent in law and void: *Doremus v. Lewis*, 8 Barb. 124; *Truitt v. Caldwell*, 3 Minn. 364; 74 Am. Dec. 764; *Greeley v. Dixon*, 21 Fla. 413; 58 Am. Rep. 673; the reservation to the grantor, in a deed of trust, for the payment of his debts, of the surplus, should there be any after payment of all the creditors, is clearly not fraudulent, as it is no more than the law would have required without any such provision: *Hoffman v. Mackall*, 5 Ohio St. 124; 64 Am. Dec. 637. Compare *Bailey v. Mills*, 27 Tex. 434. A provision in an assignment for the benefit of creditors, that repayment shall be made to the assignor of the surplus left after the complete discharge of the debts of

all "assenting" creditors is void, in so far as it attempts to protect such surplus from the claims of the nonassenting creditors, but does not invalidate the assignment as to the assenting creditors: *Skipwith v. Cunningham*, 8 Leigh, 271; 31 Am. Dec. 642. So an assignment for the benefit of creditors is rendered fraudulent and void by the reservation of a reasonable fee for drawing the instrument: *Wolfsheimer v. Rivinus*, 64 Md. 230; 54 Am. Rep. 769; or by a provision that the assignee, a lawyer, shall be allowed a reasonable counsel fee, over and above all expenses and commissions, for executing the trusts: *Nichols v. McEwen*, 17 N. Y. 22; or by a stipulation directing a particular attorney to be paid a fixed sum as a fee, not alone for drawing the assignment, but, in addition, for services to be subsequently rendered in maintaining the assignment, if assailed, and the amount is to be paid absolutely whether such future services are required or not: *Selleck v. Pollock*, 69 Miss. 870. A trust deed executed immediately before such an assignment, and in contemplation thereof, to secure an attorney a fee agreed upon in the matter of the assignment, will be construed with the assignment, and as a part thereof: *Selleck v. Pollock*, 69 Miss. 870.

Leaving a debtor in possession of his property is such a benefit as vitiates an assignment made by him for the benefit of his creditors: *Anderson v. Fuller*, 1 McMull. Eq., 27; 36 Am. Dec. 290; *Shufeldt v. Jenkins*, 22 Fed. Rep. 359, 368; *Baum v. Pearce*, 67 Miss. 700; especially where such possession is for any considerable length of time, and is unexplained; *Grimsley v. Hooker*, 3 Jones' Eq. 4; 67 Am. Dec. 227; or where control of the property is so reserved as to enable the debtor, at his pleasure, to make or withhold payment, according as his creditors shall submit to or reject the terms dictated by him: *Niolon v. Douglas*, 2 Hill Ch. 443; 30 Am. Dec. 368. If a trust deed, on its face, reserves to the grantor power to use, enjoy, and control the property conveyed, which powers are inconsistent with its professed object, and adequate to defeat it, the deed is fraudulent as to creditors and void as to purchasers: *Saunders v. Waggoner*, 82 Va. 316; *McCormick v. Atkinson*, 78 Va. 8.

A debtor, in making an assignment for the benefit of his creditors, cannot withdraw from its operation any part of his property for the future support of himself, and, therefore, where such debtor gives to a person his note, and receives the note of the latter for the same sum, for the purpose of providing a future support for the debtor, the note to be paid from the goods assigned, such transaction will be treated as fraudulent and void as to creditors: *Pettibone v. Stevens*, 15 Conn. 19; 38 Am. Dec. 57. So, if the assignor reserves one hundred dollars out of assets, for his own benefit, it will make the assignment fraudulent and void as to creditors, although the assets assigned are of great value, and the sum withheld by the assignor is to meet pressing family necessities: *Montgomery v. Goodbar*, 69 Miss. 333; but in *Shufeldt v. Jenkins*, 22 Fed. Rep. 359, 367, it said that: "The law does not forbid the retention of a few hundred dollars by an insolvent grantor for paying small debts, when circumstances warrant the measure"; but that the deed of assignment ought not to conceal the fact.

An assignment containing a trust for the assignor himself is fraudulent and void: *Pettibone v. Stevens*, 15 Conn. 19; 38 Am. Dec. 57; *Wright v. Linn*, 16 Tex. 34. If there is any secret trust for the benefit of the assignor, or an understanding that the assignment is, in any degree, for his benefit, it is a fraud upon creditors, and is consequently void: *Wright v. Linn*, 16 Tex. 34. Provisions in assignments or conveyances by an insolvent, tending to favor him at the expense of the creditors, are narrowly scrutinized, and must, on their face, be clear of all taint of fraud in order to be sustained. Hence, an assignment, by an insolvent debtor, which provides for a resulting interest to the assignor, without paying all the creditors, is of itself evidence of an intent to hinder, delay, and defraud creditors, and is consequently void as to them. Such intent is to be presumed by the court, and there is no question to submit to the jury: *Truitt v. Caldwell*, 3 Minn. 364; 74 Am. Dec. 764.

An assignment in trust for the benefit of certain creditors, which includes property consumable in using, is fraudulent and void, if it provides that the debtor shall remain in possession of such property and use it although other property not consumable is also included: *Sommerville v. Horton*, 4 Yerg. 541; 26 Am. Dec. 242. An assignment is not avoided, however, by the assignor's retention of property specified in the instrument as having been assigned: *Pike v. Bacon*, 21 Me. 280; 38 Am. Dec. 259.

Any reservation, in the assignment, of property for the benefit of the debtor's family is fraudulent and void as to his nonassenting creditors: *McOlurg v. Lecky*, 3 Penr. & W. 83; 23 Am. Dec. 64; *Beck v. Burdett*, 1 Paige, 805; 19 Am. Dec. 436; who may take the property in execution: *McAllister v. Marshall*, 6 Bin. 338; 6 Am. Dec. 458.

While an assignment for the benefit of creditors is fraudulent and void as against attaching creditors of the assignor, if he reserves a part of his property not exempt by law for his own benefit (*Wichita etc. Grocery Co. v. Records*, 40 Kan. 119; *Penzel Grocer Co. v. Williams*, 53 Ark. 81), a general assignment of all the debtor's property is not rendered fraudulent because the debtor reserves to himself a homestead or other exemptions to which he is lawfully entitled: *Southern Suspender Co. v. Van Borries*, 91 Ala. 507; *Frank v. Myers*, 97 Ala. 437; *Richardson v. Stringfellow*, 100 Ala. 416; *Penzel Grocer Co. v. Williams*, 53 Ark. 81; *Clark Shoe Co. v. Edwards*, 57 Ark. 831; *Baker v. Baer*, 59 Ark. 503; *King v. Hargadine-McKlittrick etc. Co.*, 60 Ark. 1; *Wilhoit v. Bryant*, 78 Cal. 263; *Parker v. Cleveland*, 37 Fla. 39; *Dorr v. Schmidt*, 38 Fla. 354; *Bradley v. Bischel*, 81 Iowa, 80; *Muhr v. Pinover*, 67 Md. 480; *Hartzler v. Tootle*, 85 Mo. 23; *Bobblitt v. Rodwell*, 105 N. C. 236; *Morehead Banking Co. v. Whitaker*, 110 N. C. 345; *Davis v. Smith*, 113 N. C. 94; *Haynes v. Hoffman*, 46 S. C. 157; *Durham etc. Co. v. Hemphill*, 45 S. C. 621; *Dawley v. Sherwin*, 5 S. Dak. 594; *Richardson v. Marquette*, 59 Miss. 80; 42 Am. Rep. 353; *McFarland v. Bate*, 45 Kan. 1.

Creditors are not hindered or delayed by the reservation of that which they have no right to touch: *Hildebrand v. Bowman*, 100 Pa. St. 580. The reservation of money which, in amount, is equal to a personal property exemption, in lieu of such exemption is no evi-

dence of a fraudulent purpose: *Morehead Banking Co. v. Whitaker*, 110 N. C. 345; nor is a provision in the assignment that the assignee shall sell the property conveyed and pay to the assignor a certain amount of money as his personal property exemptions: *Blair v. Brown*, 116 N. C. 631; showing facts, however, constituting sufficient evidence of a conspiracy to defraud the creditors to admit evidence of declarations of the debtor made after the assignment: *Blair v. Brown*, 116 N. C. 631. It has been held that the reservation, from the proceeds of personal property assigned, of a sum equal to the assignor's exemptions is an unlawful benefit to the assignor at the expense of his creditors, and renders the deed of assignment void: *King v. Ruble*, 54 Ark. 418; and, on the other hand, that, if the deed of assignment does not provide for the payment of exemptions out of the proceeds of the assigned property, and no fraud or collusion as to the execution of the instrument is shown, the subsequent allowance of the exemptions out of the sale of the assigned property, does not render the deed of assignment fraudulent as to creditors: *Dorr v. Schmidt*, 38 Fla. 354. In Mississippi it is held that if the assignor, in a general assignment for the benefit of creditors, embracing all of the assignor's property save his legal exemptions, retains the proceeds of goods sold out of his store, on the day of, and the day immediately preceding that of, the assignment, to the amount of three hundred dollars, and there is no showing of any kind that the money so retained has ever been selected by him as the exemption of personal property, not to exceed in value two hundred and fifty dollars allowed by statute to certain debtors upon their selection of the same, but, on the contrary, the defendant denies in his answer, under oath, that he retained such proceeds, or any part thereof, and avers that all the money so collected was applied to the payment of his debts, such retention is fraudulent and renders the assignment void: *Mahorner v. Forchheimer*, 78 Miss. 302. An assignment is not invalid because of a direction that a chattel exemption to which the debtor is entitled under the homestead laws of the state shall be in money derived from a sale of the property assigned for the benefit of creditors: *Adler v. Cloud*, 42 S. C. 272. But if appraisers award the assignor his exemption out of the proceeds of real estate to be sold, and the assignee afterward pays over the money of his own motion and without an order of the court, he will be surcharged with it on proof that the assignor's right to receive it had been forfeited by fraud: *Kreider's Estate*, 135 Pa. St. 578. An assignor for the benefit of creditors, who fraudulently denies the ownership of property belonging to him, and thus hinders the assignee in the discharge of his duties, forfeits his right to receive out of the assigned estate "so much property as would be exempt from levy and sale on execution," reserved by him in his deed of assignment: *Kreider's Estate*, 135 Pa. St. 578.

Withholding of Property.—It is a fraud to intentionally withhold from a general assignment for the benefit of creditors property which ought to have been included in it. If necessary, he should devote the whole of his property to the payment of his debts: *Farrington v. Sexton*, 43 Mich. 454; *Smith v. Woodruff*, 1 Hilt. 462; *Yates v. Lyon*,

61 Barb. 205, 209; *Young v. Heermans*, 66 N. Y. 374, 382; *Shufeldt v. Jenkins*, 22 Fed. Rep. 359, 367; *Pike v. Bacon*, 21 Me. 280; 38 Am. Dec. 259; *Graves v. Roy*, 13 La. 454; 33 Am. Dec. 568; *Turnipseed v. Schaefer*, 76 Ga. 109; 2 Am. St. Rep. 17; *Albany etc. Steel Co. v. Southern etc. Works*, 76 Ga. 135; 2 Am. St. Rep. 26. An assignment for the benefit of creditors purporting to convey all of the property of the assignor except that exempt is made fraudulent by the intentional withholding of any part of it not exempt: *Penzel Grocer Co. v. Williams*, 53 Ark. 81. If the debtor, in bad faith, omits some of his debts and property from the inventory, the assignment is fraudulent and void: *Beardsley v. Frame*, 85 Cal. 134. So, if an assignment purports to convey all of the assignor's property for the benefit of creditors, but intentionally withholds a valuable part, the assignment is fraudulent and void, as between the assignor and attaching creditors, though such material part is withheld for the purpose of applying it to other debts not secured by the assignment, and is actually so applied: *Probst v. Welden*, 46 Ark. 405; *Clark Shoe Co. v. Edwards*, 57 Ark. 331. The withholding of property considered to be of little or no value does not, however, invalidate an assignment: *Sabin v. Lebenbaum*, 26 Or. 420; and a withdrawal of a portion of the assets of a corporation, by one of the directors, at a time when it was hopelessly insolvent, and in contemplation of an assignment for the benefit of creditors, has been held not sufficient of itself to render a subsequent partial assignment void, where the assignment did not tend in any way to promote or cover up the acts of such director in reference to the withdrawal of such assets: *Worthen v. Griffith*, 59 Ark. 562; 43 Am. St. Rep. 50. It is not so much the value of what an assignor retains from an assignment that affects its good faith, as the fact of concealment: *Shufeldt v. Jenkins*, 22 Fed. Rep. 359, 368.

A party must be deemed to have intended the natural and inevitable consequences of his own acts; and so, when they are voluntary and necessarily operate to defraud others, he will be deemed to have intended the fraud: *Coursey v. Morton*, 132 N. Y. 556. If, therefore, an assignor for the benefit of creditors intentionally withholds and secretes property of a substantial value from the possession of the assignee, it renders the assignment void: *Coursey v. Morton*, 132 N. Y. 556; *Turnipseed v. Schaefer*, 76 Ga. 109; 2 Am. St. Rep. 17. A general assignment broad enough in terms to cover any property belonging to the assignor is nevertheless fraudulent and invalid if property is secretly kept back from the assignee and used for private purposes, and no authority is given to the assignee to take measures to set aside fraudulent transfers: *Farrington v. Sexton*, 43 Mich. 454. Fraud in a general assignment for the benefit of creditors is fairly inferable from the fact that the goods were inventoried at five thousand and eleven dollars and sixty-eight cents, and were appraised at twenty-seven thousand two hundred and seventy-two dollars and seventy-seven cents, while the goods on hand, five weeks before, inventoried about ninety-five thousand dollars. Fraud may also be inferred from a showing that the assets of a certain company belonged to the firm making the assignment, and had been disposed of by collusion: *Farrington v. Sexton*, 43 Mich. 454.

A debtor cannot assign for the benefit of creditors, and yet hold and control his property. Hence, if he retains and controls certain of his choses in action which the deed of assignment recites are held by certain creditors as collateral security, the deed is fraudulent in law and void, no matter what the assignor's motive was in withholding the assets: *Baum v. Pearce*, 67 Miss. 700. In fact, it has been held that it must appear on the face of the deed that all of the assignor's unexempt property is by it assigned for the benefit of his creditors, and that, if it does not, the deed of assignment is void on its face as against creditors. "To hold otherwise would be to make the validity or invalidity of the assignment depend on extrinsic evidence; and it would be held good in one case, and bad in another, depending in each case on extrinsic facts. Such a state of things would be intolerable": *Tarbox v. Stevenson*, 56 Minn. 510. An assignment for the benefit of creditors must on its face convey all the property of the grantor, and negative the presumption of the possession of any other property, and any apt words to this effect will be sufficient. Extrinsic evidence is not admissible to show that the assignment does in fact convey all the property which the grantor had at the time of its execution: *Tarbox v. Stevenson*, 56 Minn. 510; *Barnitz v. Rice*, 14 Md. 24; 74 Am. Dec. 513.

Excessive Powers or Immunities to Assignees will render an assignment for the benefit of creditors fraudulent in law and void, as shown by the following cases, and the illustrations therein contained: *Hutchinson v. Lord*, 1 Wis. 286; 60 Am. Dec. 381; *Gazzam v. Poyntz*, 4 Ala. 374; 37 Am. Dec. 745; *Litchfield v. White*, 7 N. Y. 438; 57 Am. Dec. 534; *McConnell v. Sherwood*, 84 N. Y. 522; 38 Am. Rep. 537; *Dunham v. Waterman*, 17 N. Y. 9; 72 Am. Dec. 406. A debtor is not at liberty to restrict the liability of his assignee, or to extend his powers beyond the limits which are prescribed by law: *Keep v. Sanderson*, 2 Wis. 42; 60 Am. Dec. 404. A provision in the assignment that the assignee, after paying certain creditors therein named and preferred, "shall pay any other debts of said firm as fast as money sufficient shall come into his hands to pay the same, at his discretion," is fraudulent in law and void as against unpreferred creditors of the assignor not assenting thereto, because of the attempt to confer upon the assignee a discretion as to the payment of such creditors, which the assignor could not legally retain to himself, or transfer to the assignee: *Polkinghorne v. Martinez*, 65 Miss. 272. Unauthorized restrictions upon the distribution of assigned assets renders the assignment void: *Clarke v. Baker*, 36 S. C. 420.

Conditional Assignments are invalid: *Hurd v. Silsby*, 10 N. H. 108; 34 Am. Dec. 142; *Williams v. Gartrell*, 4 G. Greene, 287. An assignment for the benefit of such creditors as will execute the instrument and signify their willingness to receive dividends in full discharge of all demands, is conditional, and therefore invalid: *Hurd v. Silsby*, 10 N. H. 108; 34 Am. Dec. 142; *Graves v. Roy*, 13 La. 454; 33 Am. Dec. 568. If it reserves a portion of the assets to the assignor, in case any of the creditors do not assent to the terms prescribed, it will be deemed fraudulent, as tending to hinder, delay, and defraud creditors: *Austin v. Bell*, 20 Johns. 442; 11 Am. Dec. 297. See sub-

head "Illegal Reservations," supra. An assignment is fraudulent and void which, in addition to imposing conditions of delay upon the creditors who come in under it and excluding those who do not assent to such conditions, reserves the surplus for the benefit of the grantor: *Chafee v. Blatchford*, 6 Mackey, 459. An assignment of property not in conformity with the statute, and imposing upon creditors terms not contained therein and at variance therewith is fraudulent in law: *Knight v. Packer*, 12 N. J. Eq. 214; 72 Am. Dec. 388.

Intent to Hinder, Delay, or Defraud Creditors renders an assignment for the benefit of creditors fraudulent and void as to them, and is generally a question of fact to be ascertained upon evidence submitted to a jury: *Baldwin v. Peet*, 22 Tex. 708; 75 Am. Dec. 806; but if enough appears upon the face of the instrument to justify a court in drawing an inference that its object is to hinder, delay, and defraud creditors, the deed of assignment will be deemed fraudulent in law and void as to them, and be so declared: *Jones v. Syer*, 52 Md. 211; 36 Am. Rep. 366; *Gardner v. Commercial Nat. Bank*, 95 Ill. 298; *Malvin v. Wert*, 19 Fed. Rep. 721. This we have shown elsewhere in this note under special heads. Any stipulation, in an assignment for the benefit of creditors, which is intended to hinder or delay nonconsenting creditors must be authorized by law or the assignment, as to such creditors, will be deemed fraudulent in law and void: *Muller v. Norton*, 19 Fed. Rep. 719. Thus, it is fraudulent and void if it authorizes the assignees, in their discretion, to dispose of the assigned property on credit: *Muller v. Norton*, 19 Fed. Rep. 719, 720; *Gardner v. Commercial Nat. Bank*, 95 Ill. 298; *Nicholson v. Leavitt*, 6 N. Y. 510; 57 Am. Dec. 490. Compare subhead "Sales on Credit," supra. So, if it contains a clause giving the trustee power to dispose of the property assigned "gradually, in the manner and on the terms in which, in course of their business, the assignors have sold and disposed of their merchandise," as such a clause is an unreasonable limitation of the trustee's powers: *Inloes v. American Ex. Bank*, 11 Md. 173; 69 Am. Dec. 190; or, if it contains a clause authorizing the assignee to carry on the assignor's business for such time as the assignee may deem necessary, to prevent shrinkage and loss, and to close out and liquidate it to the best advantage, where the deed of assignment recites that the assignor has property sufficient to pay three times what he owes; together with a clause authorizing the assignee to make, assign, indorse, and guarantee any and all bills of exchange and promissory notes or other paper for any indebtedness or liability that may be contracted in carrying on the business, and to lease, or mortgage, the real estate, etc., unless compelled to close sooner upon the request of a majority of the creditors. Such clauses clearly vest power in the assignee to hinder and delay creditors, and render the assignment fraudulent: *Gardner v. Commercial Nat. Bank*, 95 Ill. 298. See subhead "Excessive Powers to Assignees," supra. It is also fraudulent if it is made to procure time, or is for the benefit of the assignor: *Gardner v. Commercial Nat. Bank*, 95 Ill. 298. See subhead "Illegal Reservations," supra. In short, the placing of property in the hands of an assignee for any other purpose than to distribute it or its proceeds among creditors,

is fraudulent and void as to creditors: *Gardner v. Commercial Nat. Bank*, 95 Ill. 298.

It must be borne in mind that every general assignment for the benefit of creditors has the effect to hinder and delay them to some extent; but no assignment is void because it hinders or delays creditors, if such delay is no longer than is necessary for the execution of the trust which it properly declares: *Nicholson v. Leavitt*, 6 N. Y. 510; 57 Am. Dec. 499; *Baldwin v. Peet*, 22 Tex. 708; 75 Am. Dec. 800; *Arnold v. Hagerman*, 45 N. J. Eq. 186; 14 Am. St. Rep. 712; *Hazell v. Bank of Tipton*, 95 Mo. 60; 6 Am. St. Rep. 22. But if the apparent effect of the assignment is to hinder or delay creditors, beyond the necessary delay incident to all valid assignments, the court may properly declare it fraudulent in law and void as to creditors, whatever the assignor's intent was: *Kansas City Packing Co. v. Hoover*, 1 App. (D. C.) 268, 274. A debtor who, believing himself solvent, places his property beyond the reach of the process of law, hinders, delays, and defrauds his creditors, notwithstanding he provides an ample fund for the payment of his debts, and his creditors are ultimately to be paid in full: *Knight v. Packer*, 12 N. J. Eq. 214; 72 Am. Dec. 388. A debtor's assignment of his property, for the benefit of his creditors, pending an action against him is fraudulent and void against the plaintiff in the action: *Knight v. Packer*, 12 N. J. Eq. 214; 72 Am. Dec. 388. While the intention of a debtor to hinder or delay creditors renders an assignment by him for their benefit fraudulent and void, that intention cannot be inferred from the solvency of the assignor any more than from his insolvency: *Ogden v. Peters*, 21 N. Y. 23; 78 Am. Dec. 122. Unless an intent or purpose to hinder and delay creditors is clearly visible in an assignment for the benefit of creditors having the appearance of fairness, it should not be held obnoxious to the statutes of 13 and 27 Elizabeth: *McCallie v. Walton*, 37 Ga. 611; 95 Am. Dec. 369. In a statute declaring void all conveyances made with the intent to hinder, delay, or defraud creditors, the words "hinder," "delay," and "defraud," are not synonymous. A conveyance may be made with intent to hinder or delay without an intent to defraud. Either intent is sufficient: *Crow v. Beardsley*, 68 Mo. 435, 439.

Exacting Releases.—In Arkansas a debtor, in making an assignment of his property for the benefit of creditors, may exact releases from creditors as a condition of preference under the deed where he dedicates all of his property not exempt by law to the payment of his debts: *King v. Hargadine-McKittrick etc. Co.*, 60 Ark. 1; *Wolf v. Gray*, 53 Ark. 75; but the general rule is that a provision in an assignment exacting a release as a condition of a preference in the assignment renders the instrument fraudulent in law and void: See *Grover v. Wakeman*, 11 Wend. 187; 25 Am. Dec. 624, and collected cases in note thereto.

So, a deed of assignment is fraudulent in law and void as to non-consenting creditors if it contains a provision that each of the creditors assenting to the assignment, must, within a specified time, either execute a release of his whole debt, or be denied any share in the proceeds of the property assigned: *Atkinson v. Jordan*, 5 Ohio

203; 24 Am. Dec. 281; *Graves v. Roy*, 13 La. 454; 33 Am. Dec. 568; *Miller v. Conklin*, 17 Ga. 430; 63 Am. Dec. 248; or, if it requires creditors to release the assignor before receiving any benefit under the deed: *Duggan v. Bliss*, 4 Colo. 223; 34 Am. Rep. 80; or, if it binds creditors to acceptance and release of their claims in full: *Hubbard v. McNaughton*, 43 Mich. 220; 38 Am. Rep. 176. Contra, *Clayton v. Johnson*, 36 Ark. 406; 38 Am. Rep. 40; or, if it creates preferences, and provides for the pro rata payment of the other creditors in full satisfaction and release: *Greeley v. Dixon*, 21 Ala. 413; 58 Am. Rep. 613. An assignment for the benefit of creditors is fraudulent, where it includes only a part of the debtor's property, and exacts from the creditors a release of the debtor: *Gadsden v. Carson*, 9 Rich. Eq. 252; 70 Am. Dec. 207; *Shufeldt v. Jenkins*, 22 Fed. Rep. 359, 367; *Wilson's Accounts*, 4 Pa. St. 430; 45 Am. Dec. 701; or, where it provides that no creditor shall participate unless he accepts his share in full satisfaction, and does not designate a time within which they are to come in, and provides that the trust shall be administered and closed under the supervision of the assenting creditors: *Collier v. Davis*, 47 Ark. 367; 58 Am. Rep. 758.

An assignment by a partner for the benefit of creditors, that exacts a release of the firm, as well as of himself is fraudulent: *Gadsden v. Carson*, 9 Rich. Eq. 252; 70 Am. Dec. 207. An assignment by partners, which stipulates for a release, is invalid, unless it transfers the separate estate of each of the partners: *Hennessy v. Western Bank*, 6 Watts & S. 300; 40 Am. Dec. 560. A general assignment by two members of a partnership, stipulating for a release to them and also to a third member of the firm, who did not execute the deed of assignment, is fraudulent on its face, although the partner failing to execute such deed may have had no estate that did not pass to the assignee: *Wilson's Accounts*, 4 Pa. St. 430; 45 Am. Dec. 701.

Coercive terms in an assignment vitiate it: *Ware v. Wanless*, 2 Wyo. 144. Thus a secret agreement of a debtor, made at the time of an assignment for the benefit of his creditors, by which he promises to pay a certain creditor his demand in full, as an inducement to his joining in the assignment and in releasing the common debtor, is void, as being a coercion upon the debtor and a fraud upon the other creditors: *Ramsdell v. Edgerton*, 8 Met. 227; 41 Am. Dec. 503.

An assignment is bad which provides for the payment of such creditors only as shall release their claims, and further provides for the payment of any surplus to the debtor: *May v. Walker*, 35 Minn. 194. Such an assignment is fraudulent and void: *Duggan v. Bliss*, 4 Colo. 223; 34 Am. Rep. 80. Compare *Borden v. Sumner*, 4 Pick. 265; 16 Am. Dec. 338.

Preferences to Creditors.—In the absence of statutes forbidding preferences every debtor has a right, before an assignment for the benefit of creditors, and before contemplation thereof, to prefer one or more of his creditors to the rest. In fact, it is a general rule that a debtor may, while retaining dominion over his property, and not contemplating an assignment, use his property in discharge of his liabilities, and pay one or more creditors to the exclusion of the others: See monographic notes to *Benham v. Ham*, 84 Am. St. Rep.

856, 857, on lawful and unlawful preferences in assignments for the benefit of creditors: *Cutter v. Pollock*, 4 N. Dak. 205; 50 Am. St. Rep. 644; *Williams v. Clark*, 47 Minn. 53; *Barnett v. Kinney*, 147 U. S. 476; *Mitchell v. Beal*, 8 Yerg. 134; 29 Am. Dec. 108; *Home Nat. Bank v. Sanchez*, 131 Ill. 330; *Livermore v. McNair*, 34 N. J. Eq. 478; *Anderson v. Tydings*, 8 Md. 427; 63 Am. Dec. 708; *Warner v. Littlefield*, 89 Mich. 329; *Sandwich Mfg. Co. v. Max*, 5 S. Dak. 125. It is only when a debtor indicates his intention of taking advantage of the law permitting and regulating general assignments, and putting his property under its protection, that he is denied the right to make preferences among his creditors: *Sandwich Mfg. Co. v. Max*, 5 S. Dak. 125. And it has been held that a debtor, if not prohibited by statute, may, even when insolvent, prefer a creditor in an assignment for the benefit of creditors: *Hull v. Jeffrey*, 8 Ohio, 890; *Grover v. Wakeman*, 11 Wend. 187; 25 Am. Dec. 624; *Paul v. Baugh*, 85 Va. 655; *Perkins v. Hutchinson*, 17 B. L. 450; *Talley v. Ourtain*, 54 Fed. Rep. 43; *Arthur v. Commercial etc. Bank*, 9 Smedes & M. 394; 48 Am. Dec. 719.

An assignment law does not deprive debtors of their common-law right to prefer creditors: *Kavanaugh v. Oberfelder*, 37 Neb. 647; *Wharton v. Clements*, 3 Del. Ch. 209; *Woonsocket Rubber Co. v. Felley*, 30 Fed. Rep. 808; *Hull v. Jeffrey*, 8 Ohio, 890; *Orow v. Beardsley*, 68 Mo. 435; *Sandwich Mfg. Co. v. Max*, 5 S. Dak. 125; *Manning v. Beck*, 129 N. Y. 1. It is only preferences conferred by the assignment that are forbidden; not preferences given by other instruments, and as a separate and independent transaction: *Gummersell v. Hanbloom*, 19 Mo. App. 274; *Lake Shore Banking Co. v. Fuller*, 110 Pa. St. 156. A preference is not invalid except as prohibited by the assignment law: *Mackellar v. Pillsbury*, 48 Minn. 896; *Kavanaugh v. Oberfelder*, 37 Neb. 647. The right of a debtor to pay one or more creditors in preference to others, and the right to make a general assignment for the benefit of all of his creditors, ratably, are distinct and independent rights: *Sandwich Mfg. Co. v. Max*, 5 S. Dak. 125.

The right to prefer creditors is denied, however, in some of the states, especially in assignments for the benefit of creditors: *Cutter v. Pollock*, 4 N. Dak. 205; 50 Am. St. Rep. 644; *Ezekiel v. Dixon*, 8 Ga. 146; *Watkins v. Jenks*, 24 Ga. 431; *Williams v. Gartrell*, 4 G. Greene, 287; *Berry v. Cutts*, 42 Me. 445; *Harshman v. Lowe*, 9 Ohio 92; *Fairchild v. Hunt*, 14 N. J. Eq. 867; *Law v. Mills*, 18 Pa. St. 185; *Weiner v. Davis*, 18 Pa. St. 331; *Varnum v. Camp*, 13 N. J. L. 326; 25 Am. Dec. 476; *Sandwich Mfg. Co. v. Max*, 5 S. Dak. 125; *Stites v. Champlon*, 49 N. J. Eq. 446; *Backhaus v. Sleeper*, 66 Wis. 68. It is sometimes provided by express statute that a preference of any creditor in a voluntary assignment for the benefit of creditors renders such assignment void: *Larrabee v. Franklin Bank*, 114 Mo. 562; 35 Am. St. Rep. 774; and any preference, in an assignment, renders the assignment fraudulent and void, where the statute prohibits such preference: *Wolf v. McGugin*, 37 W. Va. 552; *Grubbs v. Morris*, 103 Ind. 166; *Putney v. Friesleben*, 32 S. C. 492. As said in *Varnum v. Camp*, 13 N. J. L. 326, 25 Am. Dec. 476, an assignment which does not comply with the

requirements of the assignment law, forbidding preferences, is, in contemplation of law, fraudulent and void. If preferences are given, and they do not appear in the assignment itself, the fact may be shown by proof aliunde: *Berry v. Cutts*, 42 Me. 445. The question of the intent of an insolvent debtor to make a fraudulent preference of a creditor, forbidden by the insolvent law, is a question of fact, and not of law: *Haas v. Whittier*, 97 Cal. 411.

A secret promise of a preference made to a creditor to induce his acceptance of an assignment renders it fraudulent and void: *Dansby v. Frieberg*, 76 Tex. 463. An assignment attempting to confer on the assignee power to declare future preferences, as to nonpreferred creditors, in his discretion, is fraudulent and void: *Moody v. Paschal*, 60 Tex. 483. An assignment is fraudulent and void if any part of the debts preferred therein are fictitious, and the fact is known to the assignor and assignee: *Blair v. Brown*, 116 N. C. 631; *Webb v. Daggett*, 2 Barb. 9; *Irwin v. Keen*, 3 Whart. 347; *Coblentz v. Driver Mercantile Co.*, 10 Utah, 96. So, where a debtor delegates to a third person the former's power to prefer one creditor to another: *Seger v. Thomas*, 107 Mo. 635, 643. An assignment for the benefit of creditors, executed before the passage of a statute regulating the making of such assignments, and which prefers creditors without naming them, either in the body of the assignment or in a schedule annexed at the time of its execution, is fraudulent and void, upon its face, as to nonconsenting creditors: *Wolf v. O'Conner*, 88 Mich. 124. To intentionally prefer a usurious debt in a voluntary assignment by an insolvent, is fraudulent as to creditors, and avoids the instrument in toto: *Hiller v. Ellis*, 72 Miss. 701.

An assignment by a failing debtor of the whole of his property, for the benefit of certain creditors, leaving other creditors unprovided for, with a view of becoming an insolvent debtor, is a fraud upon the insolvent, and void: *Dulaney v. Hoffman*, 7 Gill & J. 170; 28 Am. Dec. 207; *Miller v. Estill*, 5 Ohio St. 508; 67 Am. Dec. 805; *Hoffman v. Mackall*, 5 Ohio St. 124; 64 Am. Dec. 637; *Crawford v. Taylor*, 6 Gill & J. 323; 28 Am. Dec. 579; *Lewis v. Burlington Sav. Bank*, 64 Vt. 626; *Thompson v. Johnson*, 55 Minn. 515; *Hastings Malting Co. v. Heller*, 47 Minn. 71. It has even been held that an assignment by a corporation of all of its property, to a trustee, in trust for the payment of creditors, ratably, is absolutely void, by statute, if made in contemplation of insolvency: *Harris v. Thompson*, 15 Barb. 62. After a debtor has determined to make a general assignment, he cannot, for the purpose of giving one or more of his creditors a priority or preference, do any act having that result. To allow this would be to permit a fraudulent evasion of the statute: *Home Nat. Bank v. Sanchez*, 131 Ill. 330. If a debtor knows that he is insolvent, and gives full security to one creditor without being able to secure others, the inference arises that he intended to create an unlawful preference in favor of the creditor so secured: *Hastings Malting Co. v. Heller*, 47 Minn. 71; but proximity between the date of assignment and the day of application in insolvency is no evidence of the debtor's intention at the date of the assignment to apply in insolvency: *Malcolm v. Hall*, 9 Gill, 177; 52 Am. Dec. 688.

It may, however, with other circumstances, be evidence that the assignment was made for the purpose of giving an undue preference, and with a view to a discharge in insolvency: *Dulaney v. Hoffman*, 7 Gill & J. 170; 28 Am. Dec. 207. The intention of a debtor, unexpressed to the creditor, to give him a preference at the time he was contemplating a general assignment, will not defeat the preference: *Lake Shore Banking Co. v. Fuller*, 110 Pa. St. 156. The court, in an Ohio case, enumerated five provisions, with authorities to support them, in the terms of an assignment or deed of trust, made in contemplation of insolvency, that are per se fraudulent, as follows, to wit: 1. A provision in the instrument postponing the period of sale and payment an unreasonable time will have that effect; and the reasonableness of the delay may depend somewhat upon the character of the property and the circumstances of the case; 2. Stipulations tending to coerce the creditors into a compromise or release of a part of their debts, or imposing other unreasonable conditions as the terms on which they are to be allowed to participate in the distribution of the trust fund, or reserving to the assignor the control and disposition of the uses to which the trust property is to be applied, will render the assignment void; 3. The reservation of a use or benefit to the grantor or his family, or any one not a creditor, will invalidate the instrument; so, also, the reservation of the surplus after paying certain specified debts, leaving other debts unpaid; 4. The reservation of a power of revocation, or the introduction of such limitations and contingencies as give the debtor a control over the property or enable him to defeat the conveyance; and 5. A provision that the transaction is to be kept secret until the debtor has secured certain advantages to himself, or has an opportunity to get beyond the reach of process issued by other creditors, or by which the deed is not to be registered or become effectual unless other creditors bring suit, will render the instrument void: *Hoffman v. Mackall*, 5 Ohio St. 124; 64 Am. Dec. 637.

The allowance of attorney's fees for drawing the deed of assignment is not an unlawful preference: *Haynes v. Hoffman*, 46 S. C. 157; *Verner v. Davis*, 26 S. C. 609; *Bryce v. Foot*, 25 S. C. 467; and courts have refused to declare an assignment fraudulent and void as to unpreferred creditors, because of the fact that the assignment provided for payment to attorneys of a certain amount for services to be rendered after the assignment, in protecting and upholding it: *Memphis Grocery Co. v. Leach*, 71 Miss. 959; *Drucker v. Wellhouse*, 82 Ga. 129; *Mills v. Pessels*, 55 Fed. Rep. 588; but other courts have denounced preferences in favor of attorneys for fees for services rendered subsequently to the assignment as fraudulent and void: *Selleck v. Pollock*, 60 Miss. 870; *Clarke v. Baker*, 36 S. C. 420; *Young v. Clapp*, 147 Ill. 176. Compare *Bickham v. Lake*, 51 Fed. Rep. 892.

A chattel mortgage is void as an assignment for the benefit of creditors if it makes forbidden preferences, or does not otherwise conform to the statute regulating such assignments: *Bonns v. Carter*, 20 Neb. 566; *Maxwell v. Simonton*, 81 Wis. 635; *Wilks v. Walker*, 22 S. C. 108; 53 Am. Rep. 706; *Winner v. Hoyt*, 66 Wis. 227; 57 Am. Rep. 257. It is said that: "The question as to whether the instru-

ment is a chattel mortgage or an assignment for the benefit of creditors must, in all cases, be determined as a question of law upon the contents of such instrument, and not upon any testimony which appears outside of such instrument; and, unless the conveyance upon its face purports to convey all of the debtor's property to secure some creditors in preference to others by an absolute title, the court is not at liberty to declare it a common-law assignment; and if facts appear outside of the instrument itself which tend to prove that the instrument was made with the intention of having the effect of a common-law assignment, or with the intention of evading the statute, then it becomes a question of fact for the jury to decide, and not for the court": *Warner v. Littlefield*, 89 Mich. 329, 348.

It is well settled that instruments all made in pursuance of the same agreement, substantially at the same time, for the same common purpose, and in relation to the same subject matter must be construed together as constituting but one paper in law: *Winner v. Hoyt*, 66 Wis. 227; 57 Am. Rep. 257. Hence, all acts done, and agreements made, substantially at the same time, for the purpose of creating an unlawful preference in an assignment for the benefit of creditors, about to be made, are to be construed, and deemed in law, as one transaction, rendering the assignment fraudulent in law and void, although the different instruments to effect the fraudulent design were not of the same date nor executed at the same time: *Hahn v. Salmon*, 20 Fed. Rep. 801; *Berry v. Cutts*, 42 Me. 445; *Winner v. Hoyt*, 66 Wis. 227; 57 Am. Rep. 257; *Wilks v. Walker*, 22 S. C. 108; 53 Am. Rep. 706; *Kiser v. Dannenberg*, 88 Ga. 541; *Watkins Nat. Bank v. Sands*, 47 Kan. 591. Compare *Benham v. Ham*, 5 Wash. 128; 34 Am. St. Rep. 851.

Thus, a mortgage executed contemporaneously with the assignment, and designed to give the mortgagees a preference, is fraudulent and void, and will be so declared, by a court of equity, at the suit of other creditors, on the refusal of the assignee to contest its validity: *Burnham v. Haskins*, 79 Mich. 35. Compare *Watkins Nat. Bank v. Sands*, 47 Kan. 591. So, if an insolvent corporation assigns the greater part of its property to a creditor, thereby being compelled to suspend, and immediately assigns the remainder of its assets for the benefit of its creditors, both transactions will be considered as a single attempt to evade the assignment law; and such creditor, having notice of all the facts and circumstances, and being a party thereto, will not be allowed to profit by the transaction at the expense of the other corporation creditors, but will be compelled to share pro rata with them in all the assets of the insolvent corporation: *Larrabee v. Franklin Bank*, 114 Mo. 582; 35 Am. St. Rep. 774.

Partnership.—In the absence of exceptional circumstances, such as the absence of a partner, or his incapacity to assent or dissent, a co-partner has no implied authority to make a general assignment of the firm effects for the benefit of creditors. Such an assignment is *prima facie* invalid or void: *Mayer v. Bernstein*, 69 Miss. 17; *Hill v. Postley*, 90 Va. 200; *Focke v. Blum*, 82 Tex. 436; *Foot v. Goldman*, 68 Miss. 529; *Shattuck v. Chandler*, 40 Kan. 516; 10 Am. St. Rep. 227; *Adams v. Thornton*, 82 Ala. 260; *Coleman v. Darling*, 66 Wis. 155;

57 Am. Rep. 253; *Fox v. Curtis*, 176 Pa. St. 52. In *Henderson v. Haddon*, 12 Rich. Eq. 393, an assignment by one member of a firm of its effects, for the benefit of creditors, was held fraudulent, because of improper provisions of the instrument, and the circumstances under which it was concocted and executed. An assignment requiring releases from creditors, when made by a member of a firm, in the firm name, and by himself individually, in which his copartner did not join, is void as to creditors: *Baylor County v. Craig*, 69 Tex. 330.

A firm may, of course, assign for the benefit of creditors; but the assignment is fraudulent in law, and void, as to partnership creditors, if it gives to the individual creditors a preference not allowed by law: *Blair v. Black*, 31 S. C. 346; 17 Am. St. Rep. 30; *Goddard v. Hapgood*, 25 Vt. 351; 60 Am. Dec. 272; *First Nat. Bank v. Halsted*, 20 Abb. N. C. 155; *Vernon v. Upson*, 60 Wis. 418; *Willis v. Bremner*, 60 Wis. 622; *Jackson v. Cornell*, 1 Sand. Ch. 343. Such an assignment is fraudulent and void in toto, as against firm creditors; not merely illegal as to the preference: *Wilson v. Robertson*, 21 N. Y. 587; *Windmuller v. Dodge*, 67 How. Pr. 253. In Michigan, however, it is held that a preference of individual debts in a copartnership assignment does not, of itself, independent of an actual intent to defraud, render the assignment void: *Nye v. Van Husan*, 6 Mich. 329; 74 Am. Dec. 690. An assignment for the benefit of creditors which directs that partnership creditors shall not receive anything out of the assets of the assignors until the individual creditors are fully satisfied gives an unlawful preference to the individual creditors, and is void under the statutes of South Carolina, which prohibit illegal preferences: *Blair v. Black*, 31 S. C. 346; 17 Am. St. Rep. 30. So, where a firm is dissolved, and its property divided between partners, the members of the firm cannot, in contemplation of insolvency, make an assignment of their property, both individual and that derived from the firm, for the benefit of, and giving preference to, their individual creditors, to the exclusion of their firm creditors. The statute relating to assignments in contemplation of insolvency will operate upon the assignment and work out an equal distribution: *Miller v. Estil*, 5 Ohio St. 508; 67 Am. Dec. 305. If a firm assigns all of the partnership property, but prefers creditors of individual partners, who loaned money to the individual partners, knowing it was to go into the partnership business, and that both partners were, at the time of such loaning, insolvent, the assignment is fraudulent in fact: *Smith v. Shipperley*, 9 Utah, 267.

On the other hand, no unauthorized preference of partnership creditors can be made to the exclusion of creditors of individuals composing the firm, where it makes a general assignment for the benefit of creditors: *Middleton v. Taber*, 46 S. C. 337. Thus, a deed of assignment which conveys partnership and individual assets to an assignee in trust, to be divided amongst partnership creditors is void, though not necessarily fraudulent under the statutes of South Carolina, prohibiting illegal preferences: *Middleton v. Taber*, 46 S. C. 337. An assignment of individual as well as of partnership property, is void as to creditors, if a preference is given to the

partnership creditors over the individual creditors as to the individual property: *O'Kane v. Hyde*, 70 Cal. 6. If an insolvent partnership assigns its property to a third person for the benefit of two of its creditors only, the preference in the assignment is void, and it will be considered a general one for the benefit of all the creditors: *Fox v. Curtis*, 176 Pa. St. 52.

A general assignment of his separate property, made by an insolvent copartner, and preferring the creditors of the firm to the exclusion of his own, is fraudulent and void as to the latter: *Jackson v. Cornell*, 1 Sand. Ch. 348.

The following cases further illustrate the above principles. Thus, an assignment with preferences made in Georgia by a surviving partner, which does not, on its face, show that both he and the partnership are insolvent, is void: *August v. Calloway*, 35 Fed. Rep. 381. An assignment for the benefit of creditors, made by a firm, for the benefit of creditors is invalidated by a direction for payment, out of the proceeds of the assigned property, of a debt of one of the assignors which has, in fact, been paid by the execution and delivery of a deed to the creditor, accepted by him as payment, and not merely as security: *First Nat. Bank v. Halsted*, 20 Abb. N. C. 155. If an assignment wrongfully and illegally deprives a creditor of his just rights, as by conveying partnership property for the payment of the firm and individual debts of the assignors, without providing that the firm debts shall be paid first, it furnishes conclusive proof of the debtors' intent to defraud their creditors. The constructive fraud evidenced by such an assignment furnishes sufficient ground to justify an inference of fraudulent intent: *Friend v. Michaelis*, 19 Abb. N. C. 354. If one of two insolvent partners transfers all his interest in the partnership assets to his copartner, who on the same day assigns for the benefit of creditors, no provision being made in the assignment for the application of the partnership assets to the payment, in the first instance, of the partnership creditors, such assignment, if given effect, destroys the privilege or preference to which the partnership creditors are entitled, of having debts due them paid out of the assets of the firm in course of liquidation, to the exclusion of the separate creditors of each partner; and it is, therefore, fraudulent in law and void as against partnership creditors: *Collier v. Hanna*, 71 Md. 253.

Conflict of Laws.—An assignment for the benefit of creditors valid in another state, but invalid here, or contrary to the policy and laws of this state, will not be enforced here, even as against personal property situate here: *Franzen v. Hutchinson*, 94 Iowa, 95; *Thurston v. Rosenfield*, 42 Mo. 474; 97 Am. Dec. 351; *Ex parte Dickinson*, 29 S. C. 453; 13 Am. St. Rep. 749; *Townsend v. Cox*, 151 Ill. 62; *Matter of Dalpay*, 41 Minn. 532; 16 Am. St. Rep. 729; *Kansas City Packing Co. v. Hoover*, 1 App. (D. C.) 268. The validity of an assignment of lands for the benefit of creditors must be determined by the law of the state where the lands are situated: *Moore v. Church*, 70 Iowa, 208; 59 Am. Rep. 439. Hence, if a resident of another state by a preferential assignment valid there, conveys all his property to assignees, for the benefit of his creditors, and includes in it lands in

this state, the assignment is void as to the lands in this state, and a purchaser from the assignee acquires no title: *Bentley v. Whittemore*, 18 N. J. Eq. 366. If parties to an assignment for creditors all live in another state, and the assignment is valid there, but invalid here, the creditors of such other state are not estopped to deny its invalidity here: *Moore v. Church*, 70 Iowa, 208; 59 Am. Rep. 439. *Contra*, *Thurston v. Rosenfield*, 42 Mo. 474; 97 Am. Dec. 351. Compare *Bryan v. Brisbin*, 26 Mo. 423; 72 Am. Dec. 219.

An instrument effectual, where made, to transfer the maker's property there situated, cannot have that effect in another state, by whose laws it is declared to be fraudulent and void. Hence, an assignment which creates a preference, although valid in New York, where it was made, is ineffectual to transfer property of the assignor, which was at the time of its execution situated in New Jersey: *Varnum v. Camp*, 13 N. J. L. 326; 25 Am. Dec. 476. So, an assignment executed in Virginia, where it is held that a condition for the release of the debtor will not invalidate a conveyance in trust for the benefit of creditors, is nevertheless fraudulent and void, in Louisiana, as to dissenting creditors, if it conveys only a portion of the insolvent's property: *Graves v. Roy*, 13 La. 454; 33 Am. Dec. 568. A clause, in a deed of assignment of a nonresident insolvent debtor, releasing the debts of creditors presenting their claims, left after the distribution of the estate, renders the deed void in Wisconsin, and the same result follows, if the statute of the state where it is made gives the deed the same effect, in cases of involuntary assignments: *Townsend v. Cox*, 151 Ill. 62. Courts of this state have jurisdiction to set aside, as to real property in this state, a fraudulent assignment made in another state, even where all the parties in interest are nonresidents: *Bank v. Stelling*, 31 S. C. 360. Compare monographic note to *Hanford v. Paine*, 78 Am. Dec. 594-597, on extraterritorial effect of assignments for the benefit of creditors.

Determination and Proof of Fraud.—The law rather favors than discountenances bona fide assignments for the benefit of creditors (*Malcolm v. Hall*, 9 Gill 177; 52 Am. Dec. 688; *Lancaster Co. Bank v. Horn*, 34 Neb. 742), and courts should be cautious in declaring such an assignment void for fraud. If it is assailed upon the ground of fraud, the fraud is to be proved and not presumed, and, if there is room left for an honest intention, the proof of fraud is wanting: *Shultz v. Hoagland*, 85 N. Y. 464; *Bernheimer v. Rindskopf*, 116 N. Y. 428; 15 Am. St. Rep. 414; *Nye v. Van Huse*, 6 Mich. 329; 74 Am. Dec. 690; *Huff v. Roane*, 22 Ark. 184, 186; monographic note to *Burch v. Smith*, 65 Am. Dec. 157-164, on what is sufficient proof of fraud. Fraud may be proved by circumstantial or presumptive evidence: *Hays v. Doane*, 11 N. J. Eq. 84; but circumstances of mere suspicion do not amount to proof of fraud: Note to *Burch v. Smith*, 65 Am. Dec. 158, 162; *Arthur v. Commercial etc. Bank*, 9 Smedes & M. 394; 48 Am. Dec. 719; and the fraud in such cases must be proved with clearness and certainty; *Paul v. Baugh*, 85 Va. 955. Public policy prohibits either of the parties to a voluntary assignment from proving a secret provision contrary to that expressed in the assignment: *Golden's Appeal*, 110 Pa. St. 581. An assignment for

the benefit of creditors is not less fraudulent because made for a valuable consideration: *Truitt v. Caldwell*, 3 Minn. 384; 74 Am. Dec. 764.

What constitutes fraud is matter of law: *Wright v. Lee*, 2 S. Dak. 596, 624; but a deed of assignment will be declared fraudulent and void in law only where the debtor appears in express terms to be providing "for his own ease, comfort or benefit, to the possible detriment or delay of creditors": *Stoneburner v. Jeffreys*, 116 N. C. 78, 85.

What is sufficient evidence of the facts required to establish fraud in an assignment is for the jury to find: *Wright v. Lee*, 2 S. Dak. 596, 624; *Kerr v. Hutchins*, 46 Tex. 384, 390; *Davis v. Smith*, 113 N. C. 94; *Stoneburner v. Jeffreys*, 116 N. C. 78, 85; *Blair v. Brown*, 116 N. C. 631. Fraudulent intent is made a question of fact in all cases arising under the California statute of frauds and fraudulent conveyances: *Billings v. Billings*, 2 Cal. 107; 56 Am. Dec. 319. A conveyance, apparently fair and valid, if made for the purpose of covering up the debtor's property, or to force creditors to accept a compromise, is as fraudulent and void as if the fraud had been written upon its face: *Collier v. Hanna*, 71 Md. 253, 262.

When fraud appears on the face of the assignment, it is so declared by the court: *Wright v. Lee*, 2 S. Dak. 596, 624; *Burt v. McKinstry*, 4 Minn. 204; 77 Am. Dec. 507; *Beck v. Burdett*, 1 Paige, 805; 19 Am. Dec. 436; *Quincy v. Hall*, 1 Pick. 357; 11 Am. Dec. 193; *Baldwin v. Peet*, 22 Tex. 708; 75 Am. Dec. 806; *Ellicks v. Copeland*, 53 Tex. 581, 589; 39 Am. Rep. 760; *Smith v. Patterson*, 57 Ark. 537; but it is only when the fact or intention which avoids a deed of assignment is patent upon the face of the instrument or is a necessary deduction from it, that the court can pronounce it void. So, the court is not authorized to tell the jury, upon proof of a given fact, that they should find against the instrument, unless fraud is a legal and indisputable deduction from the existence of the fact, or matter in question: *Scott v. Alford*, 53 Tex. 82, 92. Excess in the value of property conveyed, over and above the debts and liabilities of the assignor, is a tenable ground for avoiding an assignment for the benefit of creditors, whether shown on the face of the assignment, or by the pleadings, or by proof aliunde: *Burt v. McKinstry*, 4 Minn. 204; 77 Am. Dec. 507. A court may declare an assignment for the benefit of creditors void, without the intervention of a jury, when the fraudulent intent is expressed or admitted; when it contains a reservation of an interest, advantage, or benefit to the assignor inconsistent with the object of the conveyance; and when the deed is wanting in some of the qualities which, when wanting in any deed, render it invalid as a conveyance: *Baldwin v. Peet*, 22 Tex. 708; 75 Am. Dec. 806; and specific heads in this note. It is not the actual tendency or effect of a deed of assignment for the benefit of creditors, but the intent with which it is made, that determines the question of its validity. "It follows that if it be a trick or contrivance for the debtor's own advantage, an equal and honest distribution of his estate among his creditors being a secondary and subordinate consideration, or part of a plan or scheme previously concocted, in pursuance of which creditors are intended to be, or have been, deceived into false security,

overreached and defrauded, then the transaction should be held tainted and the deed vitiated and void: *Bank of Commerce v. Payne*, 86 Ky. 446, 466. "If a debtor by written instrument, has conveyed or encumbered his property, and the same is sought to be avoided by a creditor because made in fraud of his rights, and there is apparent upon the face of the instrument, by its express terms, or as the indisputable legal presumption therefrom, either such actual fraud in fact, or such constructive fraud in law, as should avoid it, then it is the duty of the court to so construe the instrument and declare its legal effect; otherwise it is a question of intention to be decided by the jury": *Eicks v. Copeland*, 53 Tex. 581, 589; 37 Am. Rep. 760.

When fraud is dependent upon external proof, it is to be found by the jury: *Wright v. Lee*, 2 S. Dak. 596, 624; *Eicks v. Copeland*, 53 Tex. 581, 589; 37 Am. Rep. 760; *Baldwin v. Peet*, 22 Tex. 708; 75 Am. Dec. 806; *Van Hook v. Walton*, 28 Tex. 59, 71; *Kerr v. Hutchins*, 46 Tex. 384, 390; *Billings v. Billings*, 2 Cal. 107; 56 Am. Dec. 319; *Nimmo v. Kuykendall*, 85 Ill. 476; *Bickham v. Lake*, 51 Fed. Rep. 802; *Powell v. Kelly*, 82 Ga. 1; *Drucker v. Wellhouse*, 82 Ga. 129; *Bobbitt v. Rodwell*, 105 N. C. 236; *Stoneburner v. Jeffreys*, 116 N. C. 78, 85. The circumstances which the law considers as badges of fraud only, and not fraud per se, should be submitted to the jury, so that they may draw their own conclusion as to the character of the transaction: *King v. Russell*, 40 Tex. 125.

One who attacks an assignment for the benefit of creditors as being fraudulent must assume the burden of proof, if the assignment is valid on its face: *Bernheimer v. Rindskopf*, 116 N. Y. 428; 15 Am. St. Rep. 414; note to *Burch v. Smith*, 65 Am. Dec. 159; *Washington v. Ryan*, 5 Bart. 622.

Effect of Fraud.—An assignee for the benefit of creditors may set aside a prior fraudulent transfer by his assignor: *Pillsbury v. Kingston*, 33 N. J. Eq. 287; 36 Am. Rep. 556; *Moody v. Carroll*, 71 Tex. 143; 10 Am. St. Rep. 734; *Wilson v. Berg*, 88 Pa. St. 167; *Smith's Admr. v. Wood*, 42 N. J. Eq., 503; *Deere v. Losey*, 48 Neb. 622; and may resort to any appropriate proceeding at law or in equity for that purpose: *Ball v. Sawyer*, 62 Vt. 367; *Kloeckner v. Bergstrom*, 67 Wis. 197; but he is not authorized to forcibly seize and take property on the assumption that it was transferred by his assignor in fraud of the rights of creditors: *Brown v. Farmers' etc. Banking Co.*, 36 Neb. 434. If he cannot recover it, then any creditor may pursue it as if the general assignment had not been made: *Wilson v. Berg*, 88 Pa. St. 167; *Moody v. Carroll*, 71 Tex. 143; 10 Am. St. Rep. 734; *Dittman v. Weiss*, 87 Tex. 614; *Sampson v. Jackson*, 103 Ala. 550; *Gates v. Andrews*, 37 N. Y. 657; 97 Am. Dec. 704; *Grimley v. Hooker*, 3 Jones' Eq. 4; 67 Am. Dec. 227; *Austin v. Morris*, 23 S. C. 393. Some of the cases hold that his demand must first be reduced to judgment; others, not: See monographic note to *Adlum v. Yard*, 18 Am. Dec. 621-625, upon a creditor attacking a conveyance as fraudulent. If the assignee has acted in good faith, and without notice of any fraud, he should be protected though the assignor has been guilty of fraud: *Kreider's Estate*, 135 Pa. St. 578; and should

be allowed costs where he has acted under a void assignment, believing it to be valid: *T. T. Haydock Carriage Co. v. Pier*, 78 Wis. 579; *Bishop v. Catlin*, 28 Vt. 71. If the assignment is constructively fraudulent in point of law, he is entitled to retain his own bona fide debts, for as to these he stands upon equal grounds with any other creditors: *Beach v. Viles*, 2 Pet. 675.

Until the trust in favor of creditors has been legally formed, the property of the assignor is, though in the hands of the assignee, subject to attachment, execution, or other process in favor of any of his creditors; and this is so, of course, where the assignment is fraudulent and void: *Grever v. Culver*, 84 Wis. 295, 298; *Hess v. Hess*, 117 N. Y. 306; *Wright v. Lee*, 4 S. Dak. 237; *McClurg v. Lecky*, 8 Penr. & W. 83; 23 Am. Dec. 64; *Stewart v. McMinn*, 5 Watts & S., 100; 89 Am. Dec. 115; *Wilson v. Aaron*, 132 Ill. 238; *Haines v. Campbell*, 8 Wis. 187. In Massachusetts, a preference given by an insolvent debtor to a bona fide creditor cannot be avoided by an attaching creditor, whether the form of preference is a general assignment for the benefit of such creditors as shall assent thereto, or an assignment for the benefit of certain specified creditors, or an assignment directly to a single creditor: *Sawyer v. Levy*, 162 Mass. 190. An assignment which is fraudulent in law, though not fraudulent in fact, is ground for an attachment: *Leitensdorfer v. Webb*, 1 N. Mex. 34; *McReynolds v. Dedman*, 47 Ark. 347; *Wright v. Lee*, 4 S. Dak. 237. An assignment tainted by moral or legal fraud does not divest the debtor of the property; but it still remains in him liable to the execution of those creditors who have not assented thereto: *McClurg v. Lecky*, 8 Penr. & W. 83; 23 Am. Dec. 64.

Large purchases of goods on credit, though made with intent to defraud the vendors, do not invalidate a subsequent voluntary assignment, unless they were made in contemplation of such assignment: *Greene v. Van Vechten*, 63 Wis. 16. Actual fraud is, of course, matter for proof aliunde: *Drucker v. Wellhouse*, 82 Ga. 129. If it is sought to sustain an attachment, on the ground that the debtor has made an assignment which is fraudulent in law, the fact that the assignment is, on its face, constructively fraudulent and void, does not warrant a court in directing a verdict for the attaching creditor, when it appears that the attachment was, in fact, issued before the making of the assignment, because the attachment cannot be sustained until the jury find that, at the time it was issued, the defendant contemplated making the assignment: *Bickham v. Lake*, 51 Fed. Rep. 892.

An assignment cannot be invalidated by any subsequent fraudulent act of the assignor: *Baker v. Baer*, 59 Ark. 503.

The question of fraud and fraudulent intent in the making of an assignment can always be inquired into by any persons who may have an interest in the subject matter of the action: *Wright v. Lee*, 2 S. Dak. 506; *Hays v. Doane*, 11 N. J. Eq. 84; *Haines v. Campbell*, 8 Wis. 187.

An assignment may be set aside or avoided for fraud: *Anderson v. Fuller*, 1 McMull. Eq. 27; 36 Am. Dec. 290; *Malcolm v. Hall*, 9 Gill, 177; 52 Am. Dec. 688. An invalid assignment is void as to creditors

who will have nothing to do with it. They may, therefore, disregard it, and lay hold of the assigned property, or its proceeds, in the hands of the assignee, by garnishment or otherwise, as they may see fit. As to them, the property and its proceeds are not in custodia legis: *May v. Walker*, 35 Minn. 194. In Michigan, an assignment for the benefit of creditors, when fully perfected, cannot be set aside at the suit of an attachment or execution creditor by proof of unlawful preferences, or of any fraud in the matter of such assignment: *Wolf v. Slosson*, 83 Mich. 543; 21 Am. St. Rep. 613. Compare *Sweetzer v. Higby*, 63 Mich. 13; *Scott v. Chambers*, 62 Mich. 532.

A deed of assignment for the benefit of creditors generally, but void as to them, may, nevertheless, be good as between the parties: *Dawley v. Sherwin*, 5 S. Dak. 594; *Mackie v. Cairns*, 5 Cow. 547; 15 Am. Dec. 477; *Gates v. Andrews*, 37 N. Y. 657; 97 Am. Dec. 764. A fraudulent deed of assignment binds the grantor, though it is void as to creditors. As to them it has no lawful existence: *Bellamy v. Bellamy*, 6 Fla. 62; *Finley v. McConnell*, 60 Ill. 259; *Chandler v. Von Roeder*, 24 How. 224, 227. The grantor is estopped to show that his own deed was fraudulent, and therefore void: *Mackie v. Cairns*, 5 Cow. 547; 15 Am. Dec. 477. Hence, those who subsequently become his grantees are likewise estopped: *Finley v. McConnell*, 60 Ill. 259. As the assignor divests himself of all title by a fraudulent assignment, he has no power to validate it by a lawful second assignment, after the rights of objecting creditors have attached: *Gates v. Andrews*, 37 N. Y. 657; 97 Am. Dec. 764; nor is his confession of judgment, subsequent to the first fraudulent assignment, in favor of the assignees, of any effect, for there is no estate remaining in him on which the judgment can operate: *Mackie v. Cairns*, 5 Cow. 547; 15 Am. Dec. 477. So, when property in the hands of an assignee for the benefit of creditors is attached as the property of the assignor, and a suit is instituted by the assignee against the sheriff to recover the value of the attached property, the officer must show, before he can attack the assignment as fraudulent and void, that he has taken the property under a valid attachment at the suit of a creditor of the assignor, and that he has pursued the statutory steps in relation thereto, subsequent to its seizure: *Dawley v. Sherwin*, 5 S. Dak. 594. If a statute gives an assignment the effect of passing all the property of the assignor to the assignee, whether mentioned in the assignment or not, this does not, however, pass title to property which the assignor had previously conveyed, though in fraud of creditors: *Dittman v. Weiss*, 37 Tex. 614.

A subsequent attempt to restore the proceeds of property divested by a fraudulent assignment will not make it valid: *Friedburgher v. Jarberg*, 20 Abb. N. C. 279; *Younger v. Massey*, 39 S. C. 115. Neither can an assignment, fraudulent as to a creditor, become valid, because lapse of time has barred the creditor's debt, nor will such lapse of time place the assignee in a position to claim affirmative relief in equity against such creditor: *Chaffee v. Blatchford*, 6 Mackey, 459. So, an assignment void in law cannot be made good by averment, or proof of extraneous facts, when the matter render-

ing it void appears upon the face of the instrument: *Inloes v. American Ex. Bank*, 11 Md. 173; 69 Am. Dec. 190.

If an assignment is fraudulent and void, the assignee, having possession of the property, cannot sell it and confer a title on the purchaser, nor can the assignor make such a sale, nor can both together, the purchaser being chargeable with notice: *Haines v. Campbell*, 8 Wis. 187. As to the status of releasing creditors, under an assignment fraudulent on its face, and the rights of an assignee appointed to succeed the assignee of a fraudulent assignment, see *Wilson's Accounts*, 4 Pa. St. 430; 45 Am. Dec. 701. Equity may take charge of property assigned for the benefit of creditors, but fraudulently, or not in conformity with the statute, and administer it for the ratable payment of all the creditors: *Wolf v. McGugin*, 87 W. Va. 552; *Kerbs v. Ewing*, 22 Fed. Rep. 693.

One who purchases real estate from an assignee for the benefit of creditors, under an assignment fraudulent and void upon its face, is a purchaser for a valuable consideration, and has the rights of such a purchaser, where he was without notice of the fraud: *Wilson v. Marion*, 147 N. Y. 580.

With respect to the effect of participation in fraud, in an assignment for the benefit of creditors, the cases are conflicting. In some states it is held that the fraud of the assignor alone will invalidate an assignment; that it is not necessary that the assignee or the beneficiaries should have participated in the fraud of the grantors: *Bank of Commerce v. Payne*, 86 Ky. 446; that a fraudulent intent of the assignor carried into the deed of assignment itself and made operative through it, renders it void, without regard to the question whether the assignee or beneficiaries knew anything of it or not: *Coblentz v. Driver Mercantile Co.*, 10 Utah, 96; that fraudulent preferences or conditions in a voluntary deed of assignment itself will avoid it, whether known to the assignee, or beneficiaries, or not: *Coblentz v. Driver Mercantile Co.*, 10 Utah, 96; *Harshman v. Lowe*, 9 Ohio, 93; *Shufeldt v. Jenkins*, 22 Fed. Rep. 359; that a fraudulent assignment cannot be cured by the good faith of the beneficiaries, without a new consideration: *Craft v. Bloom*, 59 Miss. 69; 42 Am. Rep. 351; and that the innocence of the assignee and beneficiaries will not render valid a fraudulent assignment: *Savage v. Knight*, 92 N. C. 493; 53 Am. Rep. 423. If the assignee is preferred to a large amount when, in fact, he is not a creditor, and the lower court finds that his claim is fictitious, the preference is a fraud in fact as distinguished from fraud in law, and makes the deed entirely void, although the assignee did not participate in the fraud: *Coblentz v. Driver Mercantile Co.*, 10 Utah, 96. This case also shows what fraudulent acts, not participated in by the assignee or beneficiaries, will not avoid an assignment: See, also, *Pettit v. Parsons*, 9 Utah, 223.

On the other hand, it is held in some of the states, that the fraudulent intent of the grantor alone will not avoid a deed of assignment to creditors, unless the assignee, or the creditors, knew of, or participated in, the fraud: *Truss v. Davidson*, 90 Ala. 359, 361; *Paul v. Baugh*, 85 Va. 955; *Talley v. Curtain*, 54 Fed. Rep. 43; *Pettit v. Par-*

sons, 9 Utah, 223, commented upon in *Coblents v. Driver Mercantile Co.*, 10 Utah, 98. Compare *Manning v. Beck*, 129 N. Y. 2. It is held in Oregon that, if an assignment is attacked, by a creditor, for fraud and illegality, it must be shown that the assignor and assignee both participated in the fraud: *Kruse v. Prindle*, 8 Or. 158.

If the assignee, according to other cases, knows of an unlawful act of preference by his grantor in executing an assignment, it cannot be maintained: *Hiller v. Ellis*, 72 Miss. 701. But again it is held that the fraud of both assignor and assignee will not render an assignment void, and that it will take effect in favor of creditors: *Burnham v. Logan*, 88 Tex. 1. It is not wholly void because some of the claims are fictitious, and the assignee was aware of their fraudulent character: *Pinneo v. Hart*, 30 Mo. 561; 77 Am. Dec. 625.

Assignment, Void in Part, Whether Void in Toto.—If any portion of an assignment for the benefit of creditors is void for actual fraud, the assignment is void in toto, as against those entitled to take advantage of the fraud, upon the principle, it is sometimes said, that if a contract is fraudulent in part, it is void altogether: *Ware v. Wanless*, 2 Wyo. 144. Fraud in law is as fatal as fraud in fact, and equity will not sever the elements of fraud from the instrument, and give effect to the rest: *Ware v. Wanless*, 2 Wyo. 144; *Kayser v. Heavenrich*, 5 Kan. 324; *Seale v. Valden*, 4 Woods, 659; *Salsbury v. Ellison*, 8 Colo. 157. Thus, the whole assignment is void where preferences made with a fraudulent intention, and which are fictitious and fraudulent in fact, are therein contained: *Smith v. Sipperley*, 9 Utah, 267; and this irrespective of the fact, whether or not the assignee or beneficiaries knew of, or were a party to, the fraud: *Smith v. Sipperley*, 9 Utah, 267; *Blair v. Brown*, 116 N. C. 631; or where a usurious debt is intentionally preferred: *Hiller v. Ellis*, 72 Miss. 701; or where the assignor expressly reserves to himself some benefit or advantage in making the assignment: *McClurg v. Lecky*, 3 Penr. & W. 83; 23 Am. Dec. 64; *Laurence v. Norton*, 15 Fed. Rep. 853; *Kayser v. Heavenrich*, 5 Kan. 324; *Irwin v. Keen*, 3 Whart. 346.

If an instrument contains a clause or provision in contravention of a statute, it renders the whole instrument void; but when it merely contravenes a rule of the common law, the invalidity is limited to the particular clause, leaving the instrument in other respects valid: *Nicholson v. Leavitt*, 4 Sandf. 252; but whether a disregard of, and departure from some directions of a state statute governing assignments for the benefit of creditors, shall invalidate the assignment, or only make the varying provision in it void, will depend, says the supreme court of the United States, upon the general policy of the statute; whether it is intended to restrain or to favor such assignments: *Cunningham v. Norton*, 125 U. S. 77.

If an assignment for the benefit of creditors is not actually fraudulent it may be upheld notwithstanding invalid provisions therein contained: *Henderson v. Pierce*, 108 Ind. 462; *Redpath v. Tutewiller*, 100 Ind. 248; *Grubbs v. King*, 117 Ind. 243. If the assignor has preferred creditors, or inserted other stipulations in the deed of assign-

ment which are constructively invalid, such assignment, if not actually fraudulent, will stand, while the invalid portions will be governed by the statute governing assignments: *Henderson v. Pierce*, 108 Ind. 462; *Redpath v. Tutewiler*, 109 Ind. 248; *Grubbs v. King*, 117 Ind. 243. The deed may be valid as to bona fide debts which it secures, and void as to fictitious and fraudulent debts attempted to be secured thereby: *Market Nat. Bank v. Hofheimer*, 23 Fed. Rep. 13. If the assignment is made to secure several independent debts, some valid and some fictitious, the court will eliminate the fictitious and allow the deed to stand as to those that are good, when the fraud complained of is fraud in law only, but when the transaction is void in part for fraud in fact, the deed will be held utterly void: *Coblentz v. Driver Mercantile Co.*, 10 Utah, 96. An assignment of different kinds of property in trust may be valid in respect to some portions of the property and invalid as to other parts thereof; but it has been held that, whenever the legal effect of any provision of the assignment is to defraud creditors, the whole assignment is void: *Rogers v. De Forest*, 7 Paige, 272.

Fraudulent Transfers Prior to Assignment.—Fraudulent transfers of property by a debtor just previous to a general assignment for the benefit of creditors do not avoid such assignment but are themselves avoidable under it: *Batten v. Smith*, 62 Wis. 92; *Feltenstein v. Stein*, 157 Ill. 19; *Thompson v. Johnson*, 55 Minn. 515; *Larrabee v. Franklin Bank*, 114 Mo. 592; 35 Am. St. Rep. 774; *Archer v. Long*, 38 S. C. 272; *Freund v. Yaegerman*, 26 Fed. Rep. 812. They do not affect the validity of the assignment: *Batten v. Richards*, 70 Wis. 272. Particularly is this true where the transfer is made in contemplation of making an assignment, and the transferee has notice of the facts, or is a party to the scheme by which he profits at the expense of other creditors. Thus, if an insolvent corporation transfers substantially all of its property to the director of a creditor bank, thereby being compelled to suspend business, and then assigns for the benefit of its creditors as to the remainder of its assets, the transactions will be deemed an evasion of the assignment law, and equity will compel such creditor bank to share pro rata with the other creditors: *Larrabee v. Franklin Bank*, 114 Mo. 592; 35 Am. St. Rep. 774. The same principle applies where an insolvent debtor mortgages his property and then makes a general assignment for the benefit of creditors. The mortgage is void, and the mortgagee must share equally with other creditors under the general assignment; the mortgage and the assignment being treated as a general assignment for the benefit of creditors pro rata: *Freund v. Yaegerman*, 26 Fed. Rep. 812.

It is sometimes provided by statute that all conveyances of property made by an insolvent debtor within a prescribed time before the commencement of proceedings in insolvency, and containing preferences, shall be void; and such statutes are valid: *Brown v. Smart*, 145 U. S. 454. So, after a debtor has determined to assign for the benefit of creditors, all steps taken by him whereby he seeks to give one creditor preference over another render his action fraudulent and void. Hence, all conveyances, transfers, and other

intended dispositions of his property or assets, whereby a preference is given, are within the assignment act prohibiting preferences, and void: *Hide etc. Nat. Bank v. Rehm*, 126 Ill. 461; *Hanford Oil Co. v. First Nat. Bank*, 126 Ill. 584; *Archer v. Long*, 88 S. C. 272. A judgment obtained under such circumstances for the purpose of preferring a creditor is void; and the holder thereof acquires no lien having priority over the claims of creditors generally: *Hide etc. Nat. Bank v. Rehm*, 126 Ill. 461; *Hanford Oil Co. v. First Nat. Bank*, 126 Ill. 584. If a creditor of an insolvent debtor secures an unlawful preference by the transfer of property, the transfer will, at the suit of the assignee in insolvency, be wholly void. It will not be partly valid because the creditor, to secure the preference, paid in money part of the agreed price of the property. If the transfer is made to the creditor, and others, who pay part of the agreed price in money, the transfer will not be valid as to such others, if they knew the purpose was to give a preference to the creditor. And a judgment declaring such a transfer void relates back to its date: *Thompson v. Johnson*, 55 Minn. 515. In cases of fraudulent transfers contemporaneous with, or prior to, an assignment, it is the duty of the assignee to have their validity determined: *Baker v. Kinnaird*, 94 Ky. 5.

Of course, if a prior transfer is made in good faith, not in contemplation of insolvency, and not with any intent to hinder, delay, and defraud creditors, the transfer and assignment, though made on the same day, are not one and the same transaction, and the transfer is valid: *Adler v. Cloud*, 42 S. C. 272; *Gage v. Parry*, 69 Iowa, 605; *Abegg v. Bishop*, 142 N. Y. 286.

Property which a debtor has fraudulently conveyed to hinder and delay creditors, and which he could not convey to strangers, does not pass by an assignment for the benefit of creditors. The assignor, himself, having no interest in the property thus fraudulently transferred, can pass no title to his assignees, and has no right to include it in his inventory: *Van Keuren v. McLaughlin*, 21 N. J. Eq. 163; *Estabrook v. Messersmith*, 18 Wis. 545; *Batten v. Smith*, 62 Wis. 92. But, while a fraudulent transfer passes title, as against the transferrer and assignor for the benefit of creditors, it does not pass the title as against the assignee in the assignment proceeding: *Batten v. Smith*, 62 Wis. 92. In California, if a conveyance in fraud of creditors is made several months prior to insolvency proceedings instituted against the grantor, the assignee in insolvency is not entitled to recover the property as assets of the insolvent estate; but the property may be sold upon a creditor's bill by a receiver, appointed for the purpose, for the benefit of creditors suing as plaintiffs in the action: *Miller v. Kehoe*, 107 Cal. 840.

DAVIS v. H. B. CLAFLIN COMPANY.

[68 ARKANSAS, 157.]

CORPORATIONS — INSOLVENCY — PREFERENCES.—
THE LEVY OF AN ATTACHMENT against an insolvent corporation is not affected by a subsequent statute prohibiting preferences among the creditors of insolvent corporations.

AN ATTACHMENT ISSUED UPON A DEBT NOT DUE
 MAY BE AVOIDED by a junior attaching creditor, and postponed to his attachment lien, where there is no statute authorizing the issuance of an attachment for a debt not due.

ATTACHMENT, WHEN CONSTRUCTIVELY FRAUDULENT AS AGAINST JUNIOR ATTACHING CREDITORS.—If a creditor sues out an attachment upon the allegation that his debtor has fraudulently disposed of property with the intent to hinder and delay creditors, when such allegation is, in fact, false, and there is no ground for the attachment, it is such a violation of law as amounts to a constructive fraud upon junior attaching creditors, who may intervene for the purpose of having such prior attachment subordinated to their liens.

Suit brought by the H. B. Claflin Company against the Holmes Dry Goods Company, of Fort Smith, Arkansas, for twenty-eight thousand three hundred and thirty-three dollars and thirty-four cents, for which amount the plaintiff held eight of the defendant's promissory notes, which had been transferred to the plaintiff, in due course of trade, by one Daughady. The plaintiff sued out an attachment in its suit, and levied upon the defendant's goods. It was alleged in the affidavit for attachment, made by plaintiff's agent, Leo Frank, that the defendant was a nonresident of the state, and that it had fraudulently disposed of its property with the fraudulent intent to hinder and delay its creditors. Subsequently, Davis and others, as intervenors, brought suits on their demands against the defendant, sued out attachments, and had them levied upon the same stock of goods. Immediately before the plaintiff had its attachment levied, the American National Bank, of Fort Smith, had brought suit, and had levied an attachment against the defendant which was prior in point of time to the other attachments. No controversy, however, was raised as to the bank's case. All of the attachments were sustained and there was a judgment against the defendant. The defendant's stock of goods was sold by the sheriff, under order of court, and he held the proceeds at the time of intervention, when the cause was transferred to equity. It was claimed by the intervenors that the plaintiff ought to be postponed to them in the distribution of the proceeds of the sale, but they did not contest the right of the bank to precedence. They charged that the notes, upon

which the plaintiff's suit was based, did not represent bona fide debts owing by the defendant to it, and that they were "collusive, simulated, and fraudulent, and were contrived, executed, delivered and received by the plaintiff and the managing officers and agents of the defendant for the purpose of hindering, delaying, and defrauding the bona fide creditors of defendant; that the said notes were never legally executed by defendant." It was alleged in the petition of the intervenors that, at the time the plaintiff's attachment was issued, no grounds existed for it; that said suit, with others, was brought with the assent, connivance, and procurement of the defendant's managing officers, and with knowledge on the part of the plaintiff that no ground for attachment existed; that plaintiff's attachment was not sued out in good faith, adversely, but in furtherance of a conspiracy between the plaintiff and the managing officers and agents of the defendant to apply the assets of the defendant to the payment of the simulated and fictitious debts of the plaintiff, etc. The intervenors, by an amended petition, filed by leave of court, alleged that on December 8, 1892, the defendant was an insolvent company, and that the attachment was sued out by the plaintiff, and judgment obtained, for the purpose of obtaining a preference in violation of the act of April 14, 1893, entitled: "An act to prevent preference among the creditors of insolvent corporations." They thereupon prayed that, if the plaintiff's debt was found to be bona fide, and its attachment not fraudulent as to petitioners, the funds in the sheriff's hands should be distributed ratably among all the creditors of the defendant. The plaintiff in its answer denied all fraud and conspiracy; denied that its debts were simulated, and alleged that they were bona fide, and that the debts for which the notes were given, and upon which its suit was brought, were just debts; denied that it was a party to any schemes, conspiracy, or contrivance for the purpose of hindering, delaying, and defrauding the bona fide creditors of the defendant; denied that said notes were never legally executed; denied that no grounds for attachment existed when it sued out its attachment; denied that its attachment was not sued out in good faith, and that it was sued out in furtherance of a conspiracy, as charged; and denied that it sued out its attachment to obtain a preference under the act above named. It prayed that the intervenor's petition be dismissed. It appeared from the pleadings, exhibits, and evidence that the defendant made no defense; and that seven of the notes sued upon by the plaintiff were not due

when the plaintiff's attachment issued. There was a decree for the plaintiff, the H. B. Claflin Company, the petition was dismissed, and the intervenors appealed from the decree.

Geo. H. Sanders, Clendenning, Mechem & Youmans, and Jos. M. Hill, for the appellants.

Morris M. Cohn, and Clayton & Brizzolara, for the appellee.

¹⁶³ HUGHES, J. Are the intervenors entitled to the relief they ask, that is, that H. B. Claflin Company be postponed to them in the distribution of the balance of funds, proceeds of the sale of the goods of the Holmes Dry Goods Company in the hands of the sheriff? Can they be heard to complain, inasmuch as the Holmes Dry Goods Company made no defense, and does not complain?

At the time of the execution of the notes, which are the basis of the suit of H. B. Claflin Company v. Holmes Dry Goods Company, and the date of the institution of this suit, and the issuance of the attachment in favor of the appellees, preferences among creditors by insolvent debtors were allowed in this state.

This court decided, in *Glaser v. First Nat. Bank*, 62 Ark. 171, that when two creditors have sued out attachments, and cause them to be levied on the same property, the junior attacher has no right to file a complaint in the action instituted by the senior attacher, and have the senior attachment set aside, by showing that it was known at the commencement thereof by both parties to the same to be without legal grounds, that it was based on an affidavit known to be false by both parties to the action in which it was filed, that it was made for the purpose of obtaining a preference over creditors, ¹⁶⁴ and that it was permitted by the debtor for that purpose, he and the first attaching creditor knowing at the time that he was in failing circumstances; that section 372 of Sandels & Hill's Digest, providing that any person may, before sale of the attached property, present his complaint to the court disputing the validity of the attachment and setting up some claim to the attached property, and his claim shall be investigated, gives no such right. We adhere to this.

As is said in that case, and the cases generally involving this question, "no creditor has the right to defend an action or proceeding against his debtor, to which he is not a party. . . . A junior attaching creditor cannot take advantage of irregularities or informalities in the proceedings in a prior attachment, though constituting good grounds to set aside the attachment

on the motion of the defendant. . . . Priority is in the gift of the debtor." If he is content, no one else can complain of mere irregularities or informalities. "The formality and regularity of such proceedings, . . . in the absence of fraud and collusion between the plaintiffs and defendants, are matters pertaining exclusively to the defendants."

In the case of *Glaser v. First Nat. Bank*, 62 Ark. 171, there was no showing or contention that the debts for which attachments were issued were not due when suit was brought, and when the attachments were issued.

The weight of judicial determination seems to be that subsequent attaching creditors, whose attachments are sustained, and who obtain judgments upon their claims, ought to have relief against attachments based on demands not yet due, where there is no statute allowing attachments for debts not due: *Ward v. Howard*, 12 Ohio St. 158; *Seibert v. Switzer*, 35 Ohio St. 661; *Nenney v. Schluter*, 62 Tex. 327; *McCluney v. Jackson*, 6 Gratt. 96; *Fairfield v. Baldwin*, 12 Pick. 388; *Pierce v. Jackson*, 6 Mass. 242; *Henderson v. Thornton*, 37 Miss. 448; 75 Am. Dec. 70; *Taafe v. Josephson*, 7 Cal. 352; *Ayres v. Husted*, 15 Conn. 504; *Patrick v. Montader*, 13 Cal. 434; *Davis v. Eppinger*, 18 Cal. 378; 79 Am. Dec. 184; *Walker v. Roberts*, 4 Rich. 561; *Palmer v. Martindell*, 43 N. J. Eq. 90; *Drake on Attachments*, secs. 273-275; *Peirce v. Partridge*, 3 Met. 49; *Hale v. Chandler*, 3 Mich. 531. "And in California, Indiana, Mississippi, and Michigan, where an attachment could not be had upon a demand not due, the issue of an attachment to secure such debt was a fraud upon junior attaching creditors, for which they could have the prior attachment dismissed": *Shinn on Attachments*, sec. 411, p. 760, note 1, and authorities cited. See, also, *Fairfield v. Baldwin*, 12 Pick. 388; *Pierce v. Jackson*, 6 Mass. 242; *Kollette v. Seibel*, 7 Tex. Civ. App. 260; *Bateman v. Ramsey*, 74 Tex. 589.

The act of April 14, 1893, entitled "An act to prevent preferences among the creditors of insolvent corporations," has no application to this case, as the attachments in this case were levied before the passage of said act.

Section 377 of *Mansfield's Digest* provides: "In an action brought by a creditor against his debtor, the plaintiff may, before his claim is due, have an attachment against the property of the debtor where: 1. He has sold, conveyed, or otherwise disposed of his property, or suffered or permitted it to be sold, with the fraudulent intent to cheat or defraud his creditors, or to hinder or delay them in the collection of their debts."

The affidavit of Leo Frank, as agent of H. B. Claflin Company, upon which their attachment was issued, states, "that the defendant is a nonresident of the state of Arkansas, and that it has fraudulently disposed of its property, with the fraudulent intent to hinder and delay its creditors."

¹⁶⁶ It appears from the evidence in the case that there was no ground for the attachment of appellee. Had the Holmes Dry Goods Company interposed a defense, and made this proof, the attachment would doubtless have been discharged, and judgment would have gone against H. B. Claflin Company as to the debts not due when the suit was brought and the attachment by H. B. Claflin Company was issued: *Cox v. Dawson*, 2 Wash. 381.

Where the statute provides for suit upon a debt not due, upon the ground that the defendant has fraudulently disposed of his property with the fraudulent intent to hinder or delay his creditors (upon which ground alone an attachment upon a debt not due is allowed by statute in this state), can junior attaching creditors intervene and show by proof that there was no ground for the attachment, and have the senior attachment postponed to their lien?

Perhaps most of the cases maintaining the right of junior attaching creditors, upon their intervention, to have a senior attachment lien postponed, when the senior attachment is issued upon a debt not due, have been determined in states where there is no statute authorizing attachments for a debt not due. Most of the cases base the right upon the ground of constructive fraud by the junior attaching creditor in obtaining an attachment upon a debt not due, when he had no ground for it, and the attempting to secure a prior lien and preference, when he is not entitled to it. Some say only that the prior attachment in such case is void, and seem to place it upon the ground that the prior attachment at the time it is issued is not authorized by law.

We think that, upon reason and authority, an attachment issued upon a debt not due may be avoided by a junior attaching creditor, and postponed to his ¹⁶⁷ attachment lien, where there is no statute authorizing the issuance of an attachment for a debt not due; and it seems that there ought to be no difference where the statute authorizes the attachment for a debt not due, upon particular circumstances or conditions which are alleged as grounds for the attachment, but which, in fact, are shown to be false. It is only where such circumstances or conditions exist that an attachment is allowed by law. If it be true that an attachment issued upon a debt not due can be avoided or postponed

at the instance of a bona fide attaching creditor, it is not important, in the opinion of some members of the court, whether we say that the reason why it can be done is because the senior attachment is void, as against the junior, because it is not authorized by law, or because it is constructively or legally fraudulent. The same end is reached, by whatever name we give the means by which it is reached.

But a majority of the court are of the opinion that the suing out of their attachment by the appellee, H. B. Claflin Company, upon the ground that the Holmes Dry Goods Company had fraudulently disposed of its property with the fraudulent intent to hinder and delay its creditors, when there was proof that such allegation was in fact false, and that there was no ground for the attachment, was such a violation of law as amounted to a constructive fraud, as against the junior attaching creditors, and would, if permitted to stand, give the appellees an unfair, inequitable, and unjust advantage over such intervenors, to which they are not entitled.

By reason of such fraud the appellee must be postponed, as to all its debts not due when its attachment was sued out, to the intervenors, in the distribution of the proceeds of the attached property in the hands of the sheriff, and it is so ordered.

¹⁶⁸ The decree is reversed, and the cause is remanded, with directions to enter a decree for the appellants, and for further proceedings not inconsistent with this opinion.

ATTACHMENT—FALSE AFFIDAVIT.—If an attachment is procured upon a false affidavit, the obligors on a bond given to release property from a levy under such attachment may successfully resist an action against them thereon by establishing the falsity of such affidavit: *Murphy v. Montandon*, 2 Idaho, 1048; 35 Am. St. Rep. 279.

ATTACHMENT—DEBT NOT DUE.—A debt not due is not subject to garnishment: *Well v. Tyler*, 38 Mo. 545; 90 Am. Dec. 441. *Contra*, *Mims v. West*, 38 Ga. 18; 95 Am. Dec. 379. An attachment issued upon a debt not due is void as against creditors whose rights are injuriously affected by it: *Davis v. Eppinger*, 18 Cal. 378; 79 Am. Dec. 184.

The affidavit of Leo Frank, as agent of H. B. Claflin Company, upon which their attachment was issued, states, "that the defendant is a nonresident of the state of Arkansas, and that it has fraudulently disposed of its property, with the fraudulent intent to hinder and delay its creditors."

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Perhaps most of the cases maintaining the right of junior attaching creditors, upon their intervention, to have a senior attachment lien postponed, when the senior attachment is issued upon a debt not due, have been determined in states where there is no statute authorizing attachments for a debt not due. Most of the cases base the right upon the ground of constructive fraud by the junior attaching creditor in obtaining an attachment upon a debt not due, when he had no ground for it, and the attempting to secure a prior lien and preference, when he is not entitled to it. Some say only that the prior attachment in such case is void, and seem to place it upon the ground that the prior attachment at the time it is issued is not authorized by law.

We think that, upon reason and authority, an attachment issued upon a debt not due may be avoided by a junior attaching creditor, and postponed to his ¹⁰⁷ attachment lien, where there is no statute authorizing the issuance of an attachment for a debt not due; and it seems that there ought to be no difference where the statute authorizes the attachment for a debt not due, upon particular circumstances or conditions which are alleged as grounds for the attachment, but which, in fact, are shown to be false. It is only where such circumstances or conditions exist that an attachment is allowed by law. If it be true that an attachment issued upon a debt not due can be avoided or postponed

at the instance of a bona fide attaching creditor, it is not important, in the opinion of some members of the court, whether we say that the reason why it can be done is because the senior attachment is void, as against the junior, because it is not authorized by law, or because it is constructively or legally fraudulent. The same end is reached, by whatever name we give the means by which it is reached.

But a majority of the court are of the opinion that the suing out of their attachment by the appellee, H. B. Claflin Company, upon the ground that the Holmes Dry Goods Company had fraudulently disposed of its property with the fraudulent intent to hinder and delay its creditors, when there was proof that such allegation was in fact false, and that there was no ground for the attachment, was such a violation of law as amounted to a constructive fraud, as against the junior attaching creditors, and would, if permitted to stand, give the appellees an unfair, inequitable, and unjust advantage over such intervenors, to which they are not entitled.

By reason of such fraud the appellee must be postponed, as to all its debts not due when its attachment was sued out, to the intervenors, in the distribution of the proceeds of the attached property in the hands of the sheriff, and it is so ordered.

¹⁶⁸ The decree is reversed, and the cause is remanded, with directions to enter a decree for the appellants, and for further proceedings not inconsistent with this opinion.

ATTACHMENT—FALSE AFFIDAVIT.—If an attachment is procured upon a false affidavit, the obligors on a bond given to release property from a levy under such attachment may successfully resist an action against them thereon by establishing the falsity of such affidavit: *Murphy v. Montandon*, 2 Idaho, 1048; 35 Am. St. Rep. 279.

ATTACHMENT—DEBT NOT DUE.—A debt not due is not subject to garnishment: *Well v. Tyler*, 38 Mo. 545; 90 Am. Dec. 441. *Contra*, *Mims v. West*, 38 Ga. 18; 95 Am. Dec. 379. An attachment issued upon a debt not due is void as against creditors whose rights are injuriously affected by it: *Davis v. Eppinger*, 18 Cal. 378; 79 Am. Dec. 184.

EDWARDS v. RANDLE.

[68 ARKANSAS, 318.]

CONTRACTS—EFFECT OF VOID PROVISION WHERE CONTRACT IS INDIVISIBLE.—If the lawful and the unlawful parts of a contract cannot be separated, so as to enforce the one and annul the other, the contract will be declared null and void throughout.

CONTRACTS—SALE OF OFFICE—PUBLIC POLICY.—IF A POSTMASTER agrees to sell his postoffice fixtures, to resign, and to recommend the appointment of his vendee as his successor, the contract is void as against public policy, and money paid on it cannot be recovered upon the failure of the postmaster to perform.

John E. Bradley, for the appellant.

³¹⁸ BUNN, C. J. The appellee, Randle, sued the appellant, Edwards, in the Clark circuit court for the sum of two hundred dollars, money paid him on a contract of purchase and sale. Judgment for plaintiff for said sum and interest, and defendant appealed.

It is shown in evidence that on or about the first day of December, 1892, the appellant, who was then postmaster at Gurdon, bargained and sold to appellee, to be delivered on the 1st of January following, for the said sum of two hundred dollars, his postoffice cabinet, fixtures, and the counters and shelving, agreeing at the time, as a part of the transaction, to resign his office and recommend appellee as his successor, which he then ³¹⁹ and there did; also to appoint Ben Cable his deputy, and to permit appellee to receive all the fees and emoluments of the office, as he says, from the time of appellee's appointment until his installation in office, but, as appellee says, from January 1st until he should become postmaster. The two hundred dollars were paid when the bargain was made. On the 1st of January aforesaid, appellee demanded a delivery of the articles sold, and in a few days afterward the demand was renewed, and both times refused to be complied with by appellant, for the reason, as he states, that he was not permitted to remove the postoffice from his to appellee's store without authority from the postoffice department, and that the delivery sought and demanded by appellee was, in fact and in truth, a demand to make such removal. Upon the refusal of appellant to comply with the demands of appellee, he then demanded a rescission of the contract of sale, on which also being refused by appellant he instituted this suit for the recovery of the money he had paid as stated, and lawful interest thereon. The defendant answered, averring that he had fully

complied with his contract as far as it was possible for him to do, and was still ready and willing to do whatever he had contracted to do, if he could do so.

There is something of a controversy as to when Cable should be appointed deputy, and when appellee should begin to enjoy the fees and emoluments of the office; also, as to whether the counters and shelves were part of the consideration of the purchase, or a mere gift. Otherwise, there is no substantial controversy as to the facts.

The transaction, taken altogether, plainly shows that the sale and purchase of the office of postmaster was the main thing, and the cabinet, furniture, fixtures, counters, and shelves were mere conveniences of little ³²⁰ or no value to anyone except he were postmaster. In fact, this is in effect admitted. Whether Cable should have been appointed deputy at once by appellant, or not until appellee's appointment should be assured, we cannot say, and that really depends upon another fact, that is, when the appellee should begin to enjoy the fees, for the appointment of Cable seems to have had some connection with that. It is reasonable to suppose that the fees should begin to be paid to appellee whenever his appointment should be assured, and not before, as stated by appellant. Be this as it may, the contract seems to have been an executed one, so far as anything the parties could do in the premises. Enough is shown, at all events, to convince the reasonable mind that the desire to rescind on the part of the appellee did not spring from any sentiment of repentance, but rather because of a failure, present or prospective, to obtain the object of his desires—the office.

The contract, as explained by the pleadings and testimony, is an indivisible one; that is to say, the lawful and the unlawful parts cannot be separated, so as to enforce the one and annul the other. Looking at the transaction in the most favorable light, it is in contravention of public policy, simply because it is an effort to create a vacancy in a public office, and to fill that vacancy by and through methods that the law cannot tolerate. The contract is therefore null and void throughout.

In *Edgerton v. Earl Brownlow*, 4 H. L. Cas. 1-256 (which is the leading English case on the subject), is to be found a most elaborate discussion of the subject by the English circuit judges and the jurists of the house of lords, and from the language of one of these in that case, Greenhood, in his work on Public Policy, page 2, makes this statement, viz: "By 'public policy' is intended that principle of the law which holds that ³²¹ no subject

can lawfully do that which has a tendency to be injurious to the public or against the public good, which may be termed the policy of the law, or public policy in relation to the administration of the law," and continuing said: "The strength of any contract lies in the power of the promisee to appeal to the courts of public justice for redress for its violation. The administration of justice is maintained at the public expense; the courts will never, therefore, recognize any transaction which, in its object, operation, or tendency, is calculated to be prejudicial to the public welfare." We need not adopt this language in all its scope and bearing, for, as said by another, the rules of public policy must not be extended, for it is always to be kept in mind that persons have a right, *prima facie*, to contract, and therefore the objection to their contracts that they contravene public policy should be manifestly against the public good.

In *Filson v. Himes*, 5 Pa. St. 452, 47 Am. Dec. 422, it was held that "a promise to secure the removal of a postoffice and the appointment of one as postmaster is illegal, on the ground of public policy, and a contract founded on such promise is void." And further: "If any part of an indivisible promise, or any part of an indivisible consideration for a promise, is illegal, the whole is void." Except as to the resignation of the incumbent, that case was very much like the one at bar. For a list of cases on the subject see *Clippinger v. Hepbaugh*, 40 Am. Dec. 519, notes.

As to whether money paid on an illegal contract will, in any case, be the subject of recovery, and if so, in what cases, see the case of *Pickett v. School Dist. No. 1*, 25 Wis. 551, 3 Am. Rep. 105, where it was said by one of the judges (all agreeing, it seems): "Still, there seems ground for a distinction between contracts which are held to be against public policy, merely on account of ³²² the personal relations of the contractor to the other parties in interest, and those which are void because the thing contracted for is itself against public policy. In the latter class, the parties acquire no rights which can be enforced either in the courts of law or equity; but in the former, the thing contracted for being in itself lawful and beneficial, it would seem unjust to allow the party who may be entitled to avoid it to accept and retain the benefit without compensation at all. And it is accordingly held, in all those cases where agents or trustees empowered to sell attempt to purchase for their own benefit, not that the sales are absolutely void and pass no title, but that they may be avoided by the principal, who may have set them aside in equity: *Story on Agency*, note 2, page 246." "In such cases

the trustee or agent, if the sale or contract were avoided, would get his money back. The principal could not take the money and avoid the sale also": See, also, *Wiggins Ferry Co. v. Chicago etc. Ry. Co.*, 73 Mo. 389; 39 Am. Rep. 519.

It is sufficient to say that the case at bar is one in which the contract is not void nor alleged to be void on account of any peculiar relation which the parties to it occupy one to the other, but because the subject matter of the contract, the thing itself contracted for, the disposition of the postoffice and the incumbency attempted, is void. This court cannot lend its aid to either party in respect to any claim or thing involved in such a contract.

The judgment is reversed, and the cause dismissed.

AN ENTIRE CONTRACT IS VOID if founded upon an indivisible consideration part of which is illegal: *Filson v. Himes*, 5 Pa. St. 452; 47 Am. Dec. 422.

CONTRACTS—SALE OF OFFICE — POSTMASTER.—An agreement to resign a public office in another's favor for a consideration is void, because against public policy: *Basket v. Moss*, 115 N. C. 448; 44 Am. St. Rep. 463, and note showing that a promise to secure the removal of a postoffice and the appointment of one as postmaster is illegal, and a contract founded thereon is void. That a sale of office is illegal, see, also, the collected cases in the note to *Ellicott v. Chamberlin*, 48 Am. Rep. 333.

KANSAS CITY, FORT SCOTT & MEMPHIS RAILWAY COMPANY v. MCGAHEY.

[68 ARKANSAS, 344.]

CARRIERS.—BAGGAGE is whatever the passenger takes with him for his personal use or convenience, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or to the ultimate purpose of the journey.

CARRIERS—LIABILITY FOR ARTICLES RECEIVED AS BAGGAGE.—If articles are presented to a carrier, by a passenger, who demands their transportation as his luggage, and the carrier is informed by the passenger, or has knowledge, from the outward appearance of the articles, that they are not usually carried as baggage, but receives and carries them as such, he is answerable for them as baggage, although he was not bound to receive them as such.

RAILROADS—LIABILITY FOR BAGGAGE ENDS, WHEN. A railroad company, as a common carrier, is answerable, as an insurer, for the baggage of a passenger until it is ready to be delivered to the owner at the place of his destination, and until he has had a reasonable time and opportunity to come and take it away. If it is not called for in a reasonable time, the company may store it in

a secure warehouse, when it becomes a mere warehouseman, with correspondingly diminished duties as to the exercise of care.

CARRIERS—REMOVAL OF BAGGAGE—TIME.—What constitutes a reasonable time and opportunity for a passenger to remove his baggage is, ordinarily, a mixed question of fact and law. If the facts are in dispute, it must be determined by the jury from the peculiar circumstances of each particular case; otherwise, it is a question of law for the court.

CARRIERS—CALLING FOR BAGGAGE—POSTPONEMENT OF TIME.—A passenger cannot extend the strict and rigid liability of a common carrier, as an insurer, by postponing the time of taking possession of his baggage, for his own convenience, on account of its arrival at a late hour of the night, or his peculiar circumstances.

RAILROADS—REASONABLE TIME FOR REMOVAL OF BAGGAGE.—If a passenger on a railway train does not reach his destination until 11 o'clock P. M., and leaves his baggage at the depot, without making any demand for it during the night of its arrival, the lateness of the hour of arrival, and the fact that there are no vehicles at the depot, or "running" at the time, by which the baggage may be removed, is not a sufficient excuse to extend the reasonable time within which the passenger must call for the baggage until the following morning.

CARRIERS—LIABILITY FOR LOSS OF BAGGAGE STORED IN A WAREHOUSE.—If a passenger fails to remove his baggage within a reasonable time after its arrival at his destination, and it is stored by the carrier in a warehouse, where it is soon afterward destroyed by fire, he cannot recover for its loss until he shows that the carrier has been guilty of such negligence as would make the latter answerable as a warehouseman for hire.

Wallace Pratt and Olden & Orr, for the appellants.

Phillips & Horton, for the appellee.

²⁴⁰ **BATTLE, J.** "Baggage," as defined by Lord Chief Justice Cockburn in *Macrow v. Great Western Ry. Co.*, L. R. 6 Q. B. 612, is 'whatever the passenger takes with him for his personal use or convenience, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or to the ultimate purpose of the journey.' As said by Mr. Justice Field in *Hannibal R. R.* ²⁴⁷ v. *Swift*, 12 Wall. 272, the contract of the carrier to carry a passenger, as to baggage, "only implies an undertaking to transport such a limited quantity of articles as are ordinarily taken by travelers for their personal use and convenience, such quantity depending, of course, upon the station of the party, the object and length of his journey, and many other considerations." Under the statutes of this state, "each passenger who shall pay fare . . . shall be entitled to have transported along with him, on the same train, and without additional charge, one hundred and fifty pounds of baggage, to consist of such articles as are usually carried by ordinary persons when traveling": *Sandels & Hill's*

Digest, sec. 6215. With the exception of the amount of the baggage, the statute is substantially the contract of the carrier with the passenger, as stated in *Hannibal R. R. Co. v. Swift*, 12 Wall. 272.

What is baggage, within the rule of the carrier's liability, is often difficult to determine. It depends, as already stated, in a great measure upon the condition in life of the passenger, and the length, nature, and object of his journey. According to this criterion, the following articles have been held to constitute baggage: The wearing apparel of the passenger in all cases; the easel of an artist on a sketching tour; the gun or fishing tackle of the sportsman when on a hunting or fishing excursion; the costly laces of a lady of wealth, high rank, and social standing, traveling on a railway; "a manuscript price book, which a commercial agent took in his valise, and used in making sales"; the surgical instruments of a surgeon in the army, traveling with troops; a few books carried for amusement or entertainment; and the manuscript books of the passenger used in the prosecution of his studies. Many cases upon this subject have been collected in a valuable treatise by ³⁴⁸ Judge U. M. Rose upon the "General Liability of Carriers of Passengers for Baggage," in 2 *American and English Railroad Cases*, New Series, 1.

When a passenger presents to the carrier for transportation his goods and chattels, and makes known what they are, or exposes them to view, or packs them in a way to give to any one concerned good reason to understand and know that they are not usually carried as baggage, and demands transportation of them as his luggage, and the carrier receives and carries them accordingly, he will be responsible for them as baggage, notwithstanding he was not bound to accept and transport them as such. If he wishes to avoid responsibility for them as baggage, he must refuse to receive them in that way: *Railway Co. v. Berry*, 60 Ark. 433; 46 Am. St. Rep. 212; *Minter v. Pacific R. R. Co.*, 41 Mo. 503; 97 Am. Dec. 288; *Sloman v. Great Western Ry. Co.*, 67 N. Y. 208; *Great Northern Ry. Co. v. Shepherd*, 8 Ex. 30; *Mauritz v. New York etc. R. R. Co.*, 23 Fed. Rep. 765; *Waldron v. Chicago etc. Ry. Co.*, 1 Dak. 336; *Oakes v. Northern Pacific Ry. Co.*, 20 Or. 392; 23 Am. St. Rep. 126; *Hannibal R. R. Co. v. Swift*, 12 Wall. 262; *Texas etc. Ry. Co. v. Capps*, 2 Tex. Civ. App. 35; *Hamburg-American Packet Co. v. Gattman*, 127 Ill. 598.

In *Railway Co. v. Berry*, 60 Ark. 433, 46 Am. St. Rep. 212, this court held "that where a passenger, who is ignorant of the rules or instructions of railway companies forbidding agents to

receive money for transportation as baggage, delivers to the baggage agent more money than the carrier is required to transport, and informs the agent of the amount (it being inclosed in the baggage, and concealed from view), if he accepts it to ship as baggage, and a loss occurs, the carrier's common-law liability will attach."

³⁴⁹ In *Minter v. Pacific R. R. Co.*, 41 Mo. 503, 97 Am. Dec. 288, a passenger delivered his trunk and a piece of carpet to the baggage master of a railroad company. The carpet was exposed to view. The passenger received a check for the trunk, but was told that none was necessary for the carpet, as it would go safely. The carpet was lost, and a suit was brought for the recovery of its value. The court held that, inasmuch as the railroad company had received and treated the carpet as personal baggage, it was liable for the loss of it, although, by the printed rules of the company, the baggage master was forbidden to receive as passenger's baggage articles of merchandise.

In *Sloman v. Great Western Ry. Co.*, 67 N. Y. 208, the plaintiff's son, a lad eighteen years of age, was employed by him as traveling agent to sell goods by sample. He had two large trunks containing the samples, and a valise for his personal baggage. The trunks did not present the appearance of ordinary traveling trunks. They were thirty inches long, twenty-seven deep and twenty-four wide. One was covered with oil-cloth, and the other was of wood. "He delivered the trunks to a baggage master at a railroad depot, and, when asked where he wanted them checked to, replied that he did not then know, as he had sent a dispatch to a customer at Fentonville to know if he wanted any goods; if not, he wanted them to go to Rochester, where he expected to meet some customers. Soon after he had them checked to Rochester, paying two dollars, and receiving a receipt ticket for them, headed 'Receipt Ticket for Extra Baggage and Dogs.' The court held that the jury were authorized by these facts to infer that the baggage master understood that the agent was traveling for the purpose of selling goods, and that these trunks contained his wares; and that he was not entitled to have them carried as ordinary baggage; and further held that the railroad company, having this ³⁵⁰ notice, was responsible for the loss of the trunks and their contents."

Some courts hold that where a railroad company receives for transportation property which it is not bound by its contract with the passenger to transport as personal baggage, of which it has notice, it must be considered to assume, with reference to

such property, the liability of a common carrier of merchandise: Hannibal R. R. Co. v. Swift, 12 Wall, 262; Sloman v. Great Western Ry. Co., 67 N. Y. 208, while others say that, if it received the property, under such circumstances, as baggage, it will be responsible therefor as a common carrier, and will be estopped from denying that it was baggage: Texas etc. Ry. Co. v. Cappa, 2 Tex. Civ. App. 35; Minter v. Pacific R. R. Co., 41 Mo. 503; 97 Am. Dec. 288; Hoeger v. Chicago etc. R. R. Co., 63 Wis. 100; 53 Am. Rep. 271; Chicago etc. R. R. Co. v. Conklin, 32 Kan. 55; Butler v. Hudson River R. R. Co., 3 E. D. Smith, 571; Railway Co. v. Berry, 60 Ark. 433; 46 Am. St. Rep. 212. It seems to us the latter view is sustained by the better reason and weight of authority. But, be that as it may, the liability of the carrier for loss and damage in transportation in either case is the same.

In the case under consideration, the plaintiff, McGahey, purchased for himself and his family, consisting of a wife and three small children, three tickets, which entitled him to transportation for himself and family and four hundred and fifty pounds of baggage over the railway of the defendant railroad company from Sulligent, in the state of Alabama, to Mammoth Springs, in this state. He delivered to the company his baggage, which was contained in two trunks and three boxes, and weighed over five hundred pounds, and paid the usual rate for the weight in excess of his baggage allowance, and received checks ³⁵¹ for the trunks and boxes, which contained property of the following description and value:

| | |
|--|----------|
| Four feather beds 40 lbs. each at 40 cts | \$ 64 00 |
| Ten pillows 4 lbs. each, at 40 cts | 16 00 |
| Forty-five quilts at \$5 each | 225 00 |
| Three pairs of blankets at \$5 | 15 00 |
| Three bed ticks at \$2 | 6 00 |
| Five double woven counterpanes at \$6 | 30 00 |
| Fourteen bed sheets at 50 cts | 7 00 |
| Thirty pillow slips at 15 cts | 4 50 |
| Eight dresses (ladies') \$2 | 16 00 |
| Thirty dresses (children's) | 30 00 |
| Twenty-five shirts and underwear | 12 00 |
| Twenty articles underwear, ladies' | 12 00 |
| Twelve pairs socks | 1 80 |
| Twenty-five yards cloth | 3 60 |
| Razor hone | 1 50 |
| Knitting yarn | 1 50 |

| | |
|---|-------|
| Three suits clothing | 24 00 |
| Two pairs pants | 2 00 |
| Four cotton shirts | 2 00 |
| Four pairs drawers (gents') | 1 60 |
| Two razors | 3 00 |
| Two pair shoes (ladies') | 2 50 |
| Five table cloths | 3 00 |
| Eight hand towels..... | 2 00 |
| One lot of pictures (photographs) | 10 00 |
| One lot carpenter tools | 5 00 |
| Seven books | 2 70 |
| Set knives and forks | 1 00 |
| One clock | 1 25 |
| Six buckets and two flat irons | 2 00 |

Total amount\$508 95"

The trunks were of the aggregate value of five dollars. From this description of the trunks and boxes ³⁵² and their contents, it is evident that the trunks and boxes must have been of a size very much larger than was necessary to hold the ordinary luggage of the number of persons entitled to transportation on three tickets would amount to. It is highly improbable that the plaintiff would carry with him such large trunks and boxes for the purpose of carrying such personal effects of himself and family as he was entitled to have carried as baggage on three tickets. The effects contained in the boxes were thereby packed in such a manner as to indicate that they were not carried as necessary personal baggage to be used on the journey, but as merchandise would be when it reaches its place of destination. From all these circumstances, we think that the judge, sitting as a jury, as he did in this case, was authorized to infer that the company was put upon notice, and given to understand, that the trunks and boxes contained more than the ordinary baggage, and that it accepted and treated the contents, without regard to what they might be, as baggage, and transported them accordingly.

Railroad companies are responsible as common carriers for the baggage of their passengers. Such responsibility continues until the baggage is ready to be delivered to the owner at the place of his destination, and until he has had a reasonable time and opportunity to come and take it away. If it be not called for in a reasonable time, the company may store it in a secure warehouse, when it becomes a mere warehouseman, and is thenceforward bound to exercise the same care, and no more, that ordinarily

prudent men do in keeping their own goods of similar kind and value: *Mote v. Chicago etc. R. R. Co.*, 27 Iowa, 22; 1 Am. Rep. 212; *Chicago etc. R. R. Co. v. Boyce*, 73 Ill. 510; 24 Am. Rep. 268.

What constitutes a reasonable time and opportunity for a passenger to remove his baggage, is, ordinarily, a mixed question of fact and law. When the facts are in ³⁵³ dispute, the jury should decide, under the instructions of the court as to the law; otherwise, it is a question of law, and the court should decide it: *Chicago etc. R. R. Co. v. Boyce*, 73 Ill. 510; 24 Am. Rep. 268; *Louisville etc. R. R. Co. v. Mahan*, 8 Bush, 184; *Roth v. Buffalo etc. R. R. Co.*, 34 N. Y. 548; 90 Am. Dec. 736.

No absolute rule on this subject can be stated. In determining whether a passenger has had a reasonable time in which to receive and remove his baggage, "the customs of the railway and of the station, the manner of transporting baggage therefrom, in short, the peculiar circumstances surrounding each case," except as hereafter stated, must be considered: *Mote v. Chicago etc. R. R. Co.*, 27 Iowa, 22; 1 Am. Rep. 212.

In many places, especially in cities, transportation for baggage can be procured immediately upon its arrival by railroad trains and steamboats. If such places be its destination, it is the duty of the passenger to present his check and receive it, on its arrival by train or steamboat, or as soon thereafter as the checks can reasonably, under the circumstances, be presented, and the baggage delivered. If he refuses or neglects to do so, the liability of the carrier is changed from that of an insurer to the responsibility of a warehouseman: *Roth v. Buffalo etc. R. R. Co.*, 34 N. Y. 548; 90 Am. Dec. 736; *Quimit v. Henshaw*, 35 Vt. 605; 84 Am. Dec. 646.

"The passenger, however, cannot extend the strict and rigid liability of common carriers as insurers by postponing the time of taking possession of his baggage for his own convenience on account of its arrival at a late hour of the night, or his peculiar circumstances. In *Chicago etc. R. R. Co. v. Boyce*, 73 Ill. 510, 24 Am. Rep. 268, it was held that the fact that a passenger on a railroad is taken sick, and is given a lay-over ticket, so that he does not reach his destination as soon as his ³⁵⁴ baggage, will not have the effect of extending the liability of the carrier as insurer beyond what it would otherwise be."

In the case before us the plaintiff and his baggage arrived at Mammoth Springs, their place of destination, at 11:08 o'clock at night. There were no conveyances at the depot, or running at

that hour. They were in the city, "a mile's distance from the defendant's depot." The plaintiff, although he saw his baggage on the platform, made no demand for it during the night of its arrival, but left it in the possession of the defendant, who stored the same in its warehouse, which was destroyed with the baggage by fire about 1 o'clock that night.

According to the evidence, it appears that plaintiff had a reasonable time in which he might, with the use of diligence, have received and removed his baggage before the fire occurred. There is no excuse given for his failure to do so, except the lateness of the hour, and the fact that no vehicles were at the depot or "running" that night by which it could have been removed. This merely shows that it was inconvenient for him to remove it during the night. This in the absence of a better showing, was not sufficient to extend the reasonable time within which the plaintiff should call for it to the next morning, so that, it not being called for, the defendant became liable for its custody as a carrier. "If it was not the usual course of business for the defendant to deliver baggage immediately on the arrival of the train at that late hour of the night, or if the railroad company detained the plaintiff's baggage for their own convenience upon the arrival of the train, such facts should have been shown by the plaintiff, and, if shown, might vary the defendant's liability for the custody of the property. But we cannot presume such facts to exist": *Quimit v. Henshaw*, 35 Vt. 616; 84 Am. Dec. 646.

³⁵⁵ The defendant company, not being liable as common carrier for the loss of the baggage of plaintiff, before he could recover on account thereof, it was necessary for him to show that the fire was the result of such negligence of the railroad company as would make it liable as a warehouseman for hire, which he failed to do.

Reversed and remanded for a new trial.

CARRIERS.—BAGGAGE includes only such articles as are carried by a passenger for his personal use and convenience, according to the wants and habits of persons of his class, either with reference to his immediate wants or the ultimate object of the journey: Note to *Oakes v. Northern Pac. R. R. Co.*, 23 Am. St. Rep. 132. If a carrier permits a passenger to take articles as baggage which are not properly such, it will be liable for their loss, though without fault: Note to *Railway Co. v. Berry*, 46 Am. St. Rep. 215. The liability of a carrier for baggage intrusted to his care terminates within a reasonable time after the arrival of the baggage at the point of destination: Note to *Ditman etc. Co. v. Keokuk etc. R. R. Co.*, 51 Am. St. Rep. 356.

CARRIERS—BAGGAGE, LIABILITY FOR LOSS OF, WHEN NOT REMOVED.—A railroad company is not liable for a pas-

senger's trunk, where he did not call for it after reaching the place of destination, but left it in the hands of the company over night, for his own convenience, and without any arrangement with them, and where it was destroyed by the burning of the depot before morning by an accidental fire, which did not occur from any negligence or fault on the part of the company: *Roth v. Buffalo etc. R. R. Co.*, 34 N. Y. 548; 90 Am. Dec. 736. The reasonable time within which a passenger must take away his baggage after its arrival at the point of destination, is, generally, by the custom in such cases, immediately upon the arrival of the train. Such time cannot be extended by the lateness of the hour of the train's arrival: *Oulmet v. Henshaw*, 35 Vt. 605; 84 Am. Dec. 646; or the detention of the passenger by sickness: *Chicago etc. R. R. Co. v. Boyce*, 73 Ill. 510; 24 Am. Rep. 288. If a passenger does not call for his baggage within a reasonable time, the company should store it, and their subsequent liability is then only that of a warehouseman: *Mote v. Chicago etc. R. R. Co.*, 27 Iowa, 22; 1 Am. Rep. 212; *Oulmet v. Henshaw*, 35 Vt. 605; 84 Am. Dec. 646; *Both v. Buffalo etc. R. R. Co.*, 34 N. Y. 548; 90 Am. Dec. 736.

MEEK v. PARKER.

[63 ARKANSAS, 267.]

MECHANIC'S LIEN ON SEPARATE TRACTS FOR ONE AMOUNT.—One who does work and furnishes materials for the improvement of two separate tracts of land is not entitled to a mechanic's lien on both tracts, for the aggregate amount claimed, unless the work was done and the materials furnished under an entire contract.

MECHANIC'S LIEN—STEEL WRENCHES AND RUBBER BELTING.—Although a statute gives a mechanic's lien to every person who shall "furnish any materials, machinery, or fixtures for any building, erection, or other improvement upon land," under a contract with the owner, one who furnishes steel wrenches and rubber belting, which are not, in any manner, attached to the land, though used in connection with a sawmill or dry kiln, is not entitled to a lien for the price thereof.

MECHANIC'S LIEN.—IF "DRY KILN WHEELS AND BOXES," designed and built expressly for use on a tramway leading into a certain dry kiln or long shed, boarded up on both sides, covered over the top, and used for drying lumber, have no value apart from such kiln, and without which the kiln cannot be used unless its structure is altered, they are, although not actually fastened to such tramway, constructively attached to, and a part of, the building within the meaning of the mechanic's lien act.

MECHANIC'S LIEN—LEASEHOLD ESTATE.—A mechanic's lien attaches to a leasehold estate in favor of one who has, under a contract with the lessee, furnished materials for the improvement of land leased for a term of years.

MECHANIC'S LIEN—WAIVER BY ACCEPTANCE OF NOTE.—One who takes a note in settlement of his account for materials furnished for the improvement of land does not waive his right to a mechanic's lien for such materials, unless the note was accepted in absolute payment of the debt. Nor does the transfer of the note, before maturity, operate as a waiver of the lien, where the payee takes it up at maturity.

Action by Parker & Waters against the Carpenter Lumber Company. The plaintiffs sought to establish a mechanic's lien upon the company's land for the value of materials furnished and repairs done for and upon buildings and improvements thereon. The property upon which the lien was claimed consisted of two separate tracts of land, over a mile apart. A planer and other improvements, owned by the lumber company, were upon one tract, which belonged to the company. The other tract was held by the company under a lease for a term of years, and had upon it a sawmill, boiler, engine, dry kiln, etc. No defense was made by the lumber company, but the appellant, Meek, as trustee for the Merchants and Planters Bank of Warren, Arkansas, was, upon his own motion, made a party defendant, and filed an answer. He claimed title by virtue of a deed of trust executed by the lumber company, conveying the property in question to him, as trustee to secure certain indebtedness due from the company to the bank. He denied the plaintiff's lien. His deed was executed after the materials had been furnished and repairs done by the plaintiffs. There was a judgment for the plaintiff's and Meek appealed.

Wells & Williamson, for the appellant.

Z. T. Wood, for the appellees.

see RIDDICK, J. The only question here is, whether, under the facts proved, the plaintiffs are entitled to a lien. If they have a lien, it is not disputed that it takes precedence of the debt secured by the trust deed. The lien claimed by the plaintiffs was for work and materials furnished for improvements upon two separate tracts of lands. It is not alleged or shown that the materials for the separate improvements were furnished under an entire contract. But the court adjudged that the aggregate amount claimed by plaintiffs was a lien upon both tracts of land, and ordered them sold, with the improvements thereon, to pay said debt. The material furnished for the improvement of one tract of land did not create a lien upon the other tract, when the same were not furnished under an entire contract. It is obvious, therefore, that the judgment is, to that extent, erroneous.

Among the materials furnished for which a lien is claimed were two steel wrenches, fifty feet of rubber belting, also certain "dry kiln wheels and boxes." It is contended that these articles were not "materials, machinery, or fixtures furnished for any building, erection, or other improvement upon land," within the meaning of our statute. The wrenches were not in any way attach-

ed to the real estate, nor were they a necessary ³⁷⁰ part of the machinery thus attached. They were only personal property, having no connection with the real estate, and for the price of which no lien attaches thereto. So far as the evidence goes, the same thing may be said of the rubber belting. It is true, there is an itemized account filed, upon which the price of this belting is charged; but there is nothing in the evidence to show that it was furnished for any "building, erection, or other improvement upon land, or that it was attached to the land, building, or machinery in any way." There is, therefore, no evidence to sustain a lien for the price of the same.

Were plaintiffs entitled to a lien for the value of the "dry kiln wheels and boxes furnished by them"? Our statute provides that every person who shall "furnish any materials, machinery, or fixtures for any building, erection, or other improvement upon land, . . . under or by virtue of any contract expressed or implied with the owner or proprietor thereof, . . . shall have for his materials, machinery, or fixtures furnished a lien upon such building, erection, or improvement, and upon the land belonging to such owner or proprietor on which the same is situated, to secure the payment of such materials, machinery, or fixtures furnished": Sandels and Hill's Digest, sec. 4731.

This statute was not intended to give a lien upon personal property. To entitle the materialman to a lien under this statute, the material or machinery furnished must as a rule be attached to or become a part of the improvement or building upon land, or must be used in making such improvement. But the testimony shows that these dry kiln wheels and boxes were designed and built expressly for use in the dry kiln of the lumber company. This dry kiln was a long shed boarded up on both sides and covered over the ³⁷¹ top. It had a wooden tramway running through it from one end to the other, upon which these wheels were fitted and made to run. Each pair of wheels were connected by an iron axle. By placing a load of lumber upon two of these axles, supported by wheels, it could be pushed along the tramway into the dry kiln, and, after the lumber became dried, it could be pushed along the tramway to the end of the kiln, from which point it was hauled away in wagons. This dry kiln was constructed especially for the use of these wheels, and could not be used without them, unless one of the sides of the dry kiln was first removed, or, in other words, without altering its structure. The testimony does not show that these wheels and axles were of a gauge used generally in dry kilns, and such as would

have a value apart from this dry kiln; but, on the contrary, it shows that they were designed, made, and fitted to the tramway of this particular dry kiln, and that, apart from it, they were of little or no value. It is a disputed question as to whether the rolling stock of a railroad should be considered appurtenant to the same, and a part of the road. But railroads are generally built of a uniform gauge, so that cars and engines of a road may be used on other roads, and have a value apart from the roads upon which they are used. In addition to this, "it is scarcely reasonable to regard as realty property which is one week in New York and the next in California, which changes its locality by many miles every hour": 3 Wood on Railroads, Minor's ed., 1961.

But the use of these wheels and axles was confined to the tramway of this particular dry kiln, and we are of opinion that, although not actually fastened thereto, they were, in law, constructively attached, and a part of the building, within the meaning of the act above ³⁷² quoted. We hold, therefore, that the plaintiffs are entitled to a lien for the price thereof upon the building and land, to the extent of the ownership of the lumber company: *Central Trust Co. v. Sheffield etc. Iron & Ry. Co.*, 42 Fed. Rep. 106; *Gray v. Holdship*, 17 Serg. & R. 413; 17 Am. Dec. 680, and note; *Dimmick v. Cook*, 115 Pa. St. 573; *Waycross Opera House Co. v. Sossman*, 94 Ga. 100; 47 Am. St. Rep. 144. See, also, argument of Matt Carpenter in note to *Minnesota Co. v. St. Paul Co.*, 2 Wall. 645.

The lumber company held the tract of land, upon which their sawmill, boiler, engine, dryhouse, etc., was situated, under a lease for a term of years. It is contended that the improvements for which the materials were furnished, being placed upon leased land, must, therefore, be treated as personal property, and that no lien attaches to such land for materials furnished for the making of such improvements. But this contention cannot be sustained. "The estates of tenants for terms of years are liable for the improvements made by them upon the demised premises. The lien extends to their entire interest under the lease, but does not affect the reversion of the lessor, unless he, by some act of his own, has obligated his estate": Phillips on Mechanics' Liens, sec. 191; *White v. Chaffin*, 32 Ark. 59; *McCullough v. Caldwell*, 5 Ark. 238; *Paulsen v. Manske*, 126 Ill. 72; 9 Am. St. Rep. 532, and note.

The last item upon the account of appellees was furnished April 2, 1894. The account not being paid on that day, the appellees accepted the note of the lumber company payable in

thirty days in settlement of said account. They afterward transferred this note to J. M. Bailey, but, the note not being paid at maturity, the appellees repaid to Bailey the amount of the note, and he reassigned it to them. It is contended that this note was accepted in payment of the account, and that the ³⁷³ lien was thus waived. One of the appellees testified that, the account being due and unpaid, this thirty day note "was accepted in payment" of the same. But this did not necessarily mean that the note was accepted in absolute payment of the account. "In those states where the common law prevails," says Mr. Phillips, "a note, unless it is taken in payment absolutely, will not discharge a mechanic's lien. It serves but to liquidate the demand, and leaves the party to seek his satisfaction upon the original contract": Phillips on Mechanics' Liens, 3d ed., sec. 276. The witnesses did not say that the note was taken in absolute payment of the account, nor is this shown by the circumstances. The court, we think, properly held that the taking of this note was only for the purpose of liquidating the account, and did not affect the lien. The note itself purports to be only a promise to pay, not a payment, and, in the absence of evidence to show that it was taken in absolute payment of the account, it must be treated as only a conditional payment: *Weymouth v. Sanborn*, 43 N. H. 171; 80 Am. Dec. 144; *Berry v. Griffin*, 10 Md. 27; 69 Am. Dec. 123; *Glenn v. Smith*, 2 Gill. & J. 493; 20 Am. Dec. 452. Our own decisions are not in conflict with this ruling, but, in our opinion, support it: *Brugman v. McGuire*, 32 Ark. 733; *Akin v. Peters*, 45 Ark. 313; *Malpas v. Lowenstine*, 46 Ark. 552; *Henry v. Conley*, 48 Ark. 267. Nor did the transfer of the note operate as a waiver of the lien. The only effect of such transfer was to suspend the right to sue until the note was returned to the appellees unpaid. The note was in the possession and control of the appellees at the time the suit was brought, and, before entering judgment, the court should have required the appellees to file said note that the same might be surrendered or canceled; but, as no complaint was made on this point, we suppose that this was done.

It appears to us that the plaintiff is entitled to a judgment and lien upon the property for some amount, ³⁷⁴ but the record is not sufficiently full for us to enter a judgment here. For the error in rendering a joint judgment against the two tracts of land, and for the other reasons given, the judgment is reversed for a new trial, in accordance with this opinion.

MECHANIC'S LIEN—SEVERAL BUILDINGS.—The statute must be construed as giving a lien on each building separately, and, unless the claimant can state the amount due from each, he must fail; but a general lien for several houses on different lots is good, if the labor and materials are furnished under a single contract: *Williams v. Judd-Wells Co.*, 91 Iowa, 378; 51 Am. St. Rep. 350, and note; *Badger Lumber Co. v. Holmes*, 44 Neb. 244; 48 Am. St. Rep. 726, and note; *Maryland Brick Co. v. Spilman*, 76 Md. 337; 35 Am. St. Rep. 431.

MECHANIC'S LIEN—LEASEHOLD ESTATE.—A mechanic's lien will attach to a leasehold estate for materials furnished for improvements thereon: See monographic note to *Loonie v. Hogan*, 61 Am. Dec. 697, on who has such ownership in or relation to property that he can bind it by mechanic's lien: *Williams v. Vanderbilt*, 145 Ill. 238; 36 Am. St. Rep. 486; *Paulson v. Manske*, 126 Ill. 72; 9 Am. St. Rep. 532.

MECHANIC'S LIEN—WAIVER—ACCEPTANCE OF NOTE.—The mere taking of the debtor's note does not waive a mechanic's lien: *Note to Hill v. Alliance Building Co.*, 55 Am. St. Rep. 833.

BROGAN v. BROGAN.

[68 ARKANSAS, 405.]

COURTS OF PROBATE—POWERS—FINAL SETTLEMENTS OF ADMINISTRATORS.—A probate court has power to determine when an administrator shall make a final settlement, and it is the duty of that court to require an administrator to make a final settlement when the assets of the estate have been fully administered.

COURTS OF PROBATE — POWERS — DETERMINING RIGHTS OF CREDITORS.—In deciding whether an administration shall be closed, a probate court has power, incidentally, to determine whether or not the creditors of a decedent's estate have, by laches, lost the power to subject the real estate of the intestate to the payment of their debts.

EXECUTORS AND ADMINISTRATORS—LAND—PAYMENT OF DEBTS.—Creditors and administrators must apply for the subjection of land to the payment of debts within a reasonable time, and if, without sufficient cause, they fail to do so, their rights in that respect will be barred.

EXECUTORS AND ADMINISTRATORS—LAND—PAYMENT OF DEBTS—LACHES.—A delay for more than seven years after the grant of letters of administration before attempting to subject the land of an intestate to the payment of his debts is not reasonable, and, therefore, defeats the rights of a creditor, or an administrator in his behalf, unless there is something to excuse the delay. That the title has been involved in litigation is no excuse where more than seven years have elapsed since the removal of that impediment.

EXECUTORS AND ADMINISTRATORS—LAND—PAYMENT OF DEBTS—LACHES.—A delay for more than seven years after the grant of letters of administration before attempting to subject the land of an intestate to the payment of his debts will bar such a proceeding, where the only excuse for the delay is that the values of real estate in the city where the land was situated were declining during that time.

EXECUTORS AND ADMINISTRATORS—LAND—PAYMENT OF DEBTS—CONSENT TO DELAY.—Although the administrator of an estate is one of its heirs, and consents, with a number of the creditors, to delay the sale of its land, because of a depression in the value of real estate, this does not, as to the nonconsenting heirs, excuse the creditors and administrator from taking steps to have the land sold for the payment of debts. Hence, a delay of over seven years will bar the right to subject the land to the payment of debts, except as to the interest of the administrator. He cannot take advantage of his own laches, and, being one of the heirs, his interest in the land is still subject to the debts of the estate.

EXECUTORS AND ADMINISTRATORS—LAND—PAYMENT OF DEBTS—LACHES—ALLOWING TIME FOR APPEAL TO EXPIRE.—If the land of an intestate is in litigation, it is not an unreasonable delay for the administrator to wait, after a final judgment in the trial court, until the time allowed for an appeal has expired before attempting to subject the land to the payment of debts.

Proceeding to compel an administrator to make and file a final settlement. Joseph Brogan, died in 1873, leaving an estate. His brother, E. C. Brogan, who was also an heir, was appointed administrator of the estate in November, 1873. The assets of the estate became exhausted, with the exception of a town lot and a farm, and some debts remained unpaid. This proceeding was brought October 10, 1894, in the probate court, by two of the heirs of Joseph Brogan, deceased. They alleged that, although the administrator still held possession of the unsold real estate, yet the right to subject such real estate to pay debts had been barred by laches; and asked the court to compel a final account to be made and filed by the administrator, for the purpose of closing the administration and thus allow the heirs to take possession of the real estate. The court found that the right to subject the town lot had been barred by laches, but that the right to subject the farm still existed. Hence, an order to compel the administrator to make a final settlement was refused. On appeal to the circuit court, it was found that the rights of the creditors were not barred as to either tract, and that court, therefore, refused to make such an order. The two heirs appealed.

Thomas Boles, for the appellants.

Jos. M. Hill and Preston C. West, for the creditors, and Grace & Forrester, for the administrator.

408 RIDDICK, J. This is a proceeding by certain heirs of an intestate to compel the administrator of his estate to make a final settlement and close the administration. Of the property of the estate there remains undisposed of only a town lot and a farm. As a reason for requiring a final settlement, it was alleged in the petition filed by the heirs that the rights of the administrator

and creditors were barred as to this remaining real estate by laches and lapse of time. This allegation was denied by the administrator and creditors, who were allowed to become parties to the proceeding, and upon the determination of the issue thus made turns the decision of the question as to whether the administrator should be ordered to make a final settlement; for, if the administrator and creditors have lost the right to subject this real estate to the payment of the debts of the estate, there is no further need for an administrator, and a final settlement should be ordered, and the administration closed.

Probate courts have no jurisdiction to determine questions of title to real estate arising under claims of title adverse to the estate. But the probate court has the power to determine when an administrator shall make a final settlement, and it is the duty of the probate court to require an administrator to make final settlement when the assets of the estate have been fully administered. And when, in order to determine whether the administration should be closed, it becomes necessary incidentally to inquire and decide whether the creditors have lost the power to subject the real estate of the intestate to the payment of their debts, the probate court has the power to determine that question also: *Tryon v. Farnsworth*, 30 Wis. 577; *McWillie v. Van Vacter*, 35 Miss. 428; 72 Am. Dec. 127; *Works on Courts and Jurisdiction*, 441; *Brown on Jurisdiction*, sec. 146.

⁴⁰⁰ We will therefore proceed to consider whether the administrator and creditors have been guilty of such laches as to bar the right to subject this real estate to the satisfaction of debts probated against the estate; for, if so, a final settlement should be ordered. It is well settled that creditors and administrators must apply for the subjection of land to the payment of debts within a reasonable time, and if, without sufficient cause, they fail to do so, their rights in that respect will be barred: *Roth v. Holland*, 56 Ark. 633; 35 Am. St. Rep. 126; *Killough v. Hinton*, 54 Ark. 65; 26 Am. St. Rep. 19; *Mays v. Rogers*, 37 Ark. 155.

Twenty-one years had expired after the grant of letters of administration before the commencement of this proceeding in the probate court. This would defeat the lien of the creditors unless there be something to excuse the delay, for it has been decided by this court that a delay for "more than seven years is not reasonable, and therefore defeats the right of a creditor or an administrator in his behalf, unless there is something to excuse the delay": *Roth v. Holland*, 56 Ark. 633; 35 Am. St. Rep. 126.

The excuse given here is, that the title to the land was involved in litigation. As the farm and town lot are entirely separate, so that the price of one was in no way affected by the litigation concerning the other, we will consider the evidence in regard to the two separately. The town lot was sold under an order of the probate court in 1876, but, afterward, in October of the same year, the court set the sale aside. The administrator did not again offer the lot for sale. On the fifth day of August, 1882, Ann Quinn brought suit against the administrator to recover this lot. This action terminated on the sixth day of February, 1885, by a judgment in favor of the estate. The administrator says he then waited three years for the time allowed for an appeal to expire. The record does not show ⁴¹⁰ whether this suit brought by Ann Quinn was an action at law or in equity, nor what issues were involved. The large majority of cases determined in the circuit courts are never appealed. Many cases turn on questions of fact, which may be so fully established upon trial that the probability of affecting the result by an appeal is too remote to be considered. So we cannot say that an administrator should in every case wait three years after a judgment in favor of the estate for land before proceeding to subject it to the payment of debts when the opposing claimants show no disposition to perfect an appeal. But, if we add the three years allowed for an appeal, there will still be less than six years that the price of the lot could have been affected by this litigation; and of the twenty-one years elapsed since the granting of letters there remain over fifteen years in which no such impediment existed.

As a further excuse for not selling, the administrator says, in substance, that, prior to the commencement of this suit by Ann Quinn, Fort Smith was only a small town, and real property was very low, and that he did not offer the lot for sale, because he knew he could not get anything like its value; that, after the lawsuit was ended and the time for appeal had expired, the "boom" in Fort Smith real estate was over, values were beginning to decline, and he did not wish to sell on a falling market. But if the fact that the values of real estate in a city were declining justified an administrator in withholding from sale a lot therein, why would not the fact that such values were advancing furnish a reason equally as cogent for withholding it from sale? And as real estate values are often either declining or advancing, it would, under such a rule, be difficult to get an estate wound up, and the heirs might be kept out of possession indefinitely. While an administrator should endeavor to sell the land of his intestate

⁴¹¹ at a fair price, he has no right to withhold it from sale for long periods, waiting for an advance in prices. No one can tell when a general advance or decline in prices of real estate will start; and administrators are not required to speculate upon land values in that way. The hazard of such an attempt is shown in this case. The evidence shows that during the "boom," or time when real estate values were high, this lot was worth three hundred dollars per front foot, and that in February, 1888, when the time for appeal had elapsed, and there existed no impediment to a sale, it was still worth two hundred and fifty dollars per front foot, but six years later was only worth one hundred dollars a front foot. In the meantime, interest upon the debts had been accumulating at ten per cent per annum. The value of the lot is less than one-half, while sixty per cent has been added to the debts by the accumulation of interest. The fact that the administrator was one of the heirs, and that three of the creditors consented to the delay, does not in any way affect the rights of the nonassenting heirs.

In our opinion, no sufficient excuse is shown for the long delay of the administrator and creditors in subjecting this town lot to the payment of the debts of the estate, and the right to do so is now barred, except as to the interest of the administrator therein. The administrator cannot take advantage of his own laches, and, as he is one of the heirs, his interest in the lot is still subject to the debts of the estate.

As to the farm tract: The administrator obtained an order, and offered it for sale, in 1876, but no one offered to purchase on account of an impending lawsuit involving the title to this land. Afterward, in 1877, the Theurer heirs brought suit to recover this tract of land, and this litigation was not settled until 1890. The adverse litigants had still three years in which to take an appeal to this court, and the ⁴¹² administrator, under the advice of his attorney, delayed offering the lands for sale until after the expiration of that time. Soon afterward this proceeding was commenced. Under the evidence, we are of the opinion that the court did not abuse its discretion in holding that the excuse given for the delay was reasonable, and that the right of the creditors to subject this tract of land to their debt is not barred.

As the farm tract of land is still subject to the lien of creditors of the estate for the payment of their debts, it follows that the judgment of the circuit court refusing to order a final settlement was right. But, in so far as the judgment of that court directed that the lot in the city of Fort Smith be sold for the payment of

debts of the estate of Joseph Brogan, the same is modified, and the order for the sale of said lot is set aside and vacated, except as to the interest of E. C. Brogan therein. In other respects the judgment of the circuit court is affirmed.

Battle and Hughes, JJ., dissent for the reason that they are of opinion that the probate court had no jurisdiction to determine the question as to title of land presented in this case.

A PROBATE COURT HAS POWER, incidentally, to try title and to pass upon the validity and construction of contracts, respecting assets of an estate within its jurisdiction: *McWille v. Van Vacter*, 35 Miss. 428; 72 Am. Dec. 127. Compare note to *Smith v. Howard*, 41 Am. St. Rep. 545.

DECEDENTS' ESTATES, LACHES IN SUBJECTING LAND TO PAYMENT OF DEBTS.—Where it is the policy of the law that seven years should be deemed a sufficient time in which to assert a title to land it ought equally to be regarded as a sufficient time in which a creditor should take such measures as should be necessary to enforce his right to have the real estate of the decedent sold to satisfy his demands: *Roth v. Holland*, 56 Ark. 633; 35 Am. St. Rep. 126. Laches in applying for orders to sell real property of decedent to pay debts is the subject of a monographic note to *Killough v. Hinton*, 26 Am. St. Rep. 22-29.

BOND v. STATE.

[63 ARKANSAS, 504.]

RAPE—CARNAL ABUSE OF FEMALE UNDER AGE OF CONSENT—ACCOMPLICE.—The rule requiring the testimony of an accomplice to be corroborated does not apply in a prosecution for the crime of carnally abusing a female person under the age of consent, because she is not an accomplice. Hence, a defendant, in such a case, may be convicted of that crime upon the uncorroborated testimony of the prosecutrix.

APPEAL.—NONREVERSIBLE ERROR—CHANGE OF VENUE.—To grant a change of venue upon the request of the defendant in a felony case, and in his absence, is not reversible error.

APPEAL—PRESENCE OF PRISONER UPON RENDITION OF VERDICT.—Under a statute providing that if the defendant, in a bailable felony case, is on bail, and shall absent himself, the trial may "progress to a verdict, at the discretion of the prosecuting attorney, but judgment shall not be rendered till the presence of the defendant is obtained," the fact that the record on appeal does not show affirmatively that he was present when the verdict was rendered is no ground for reversal. It will be presumed either that he was voluntarily absent on bail, or that he was present at the rendition of the verdict.

Conviction of carnally abusing a female person under the age of sixteen years. The injured girl was introduced as a witness and testified against the defendant, who asked the court to instruct the jury that she was an accomplice, and that he could

not be convicted upon her testimony alone, unless it was corroborated. The court refused to do this, and the defendant excepted. A change of venue was had in the case, but the record failed to show that the defendant was present when the order for the change was made. Neither did the record show affirmatively that the defendant was present when the verdict was returned into court. These were all the grounds in the motion for a new trial. It did not appear from the record whether the defendant was on bail when the trial was had, or whether he was in jail. Nor did the record show whether his absence, when the verdict was returned, was voluntary or enforced. The defendant appealed.

N. F. Lamb, for the appellant.

E. B. Kinsworthy, attorney general, for the appellee.

⁵⁰⁶ HUGHES, J. Section 1865 of Sandels and Hill's Digest provides that "every person convicted of carnally knowing or abusing any female person under the age of sixteen years shall be imprisoned in the penitentiary for a period not less than five nor more than twenty-one years."

A girl under sixteen years is not an accomplice, within the meaning of the law, in case of carnal abuse of herself. She is incapable of consenting. Obtaining ⁵⁰⁷ carnal knowledge of a girl under sixteen years of age with or without her consent is punishable under this statute. While it has been held that, in cases of seduction, bastardy, adultery, and abortion, the defendant cannot be convicted upon the uncorroborated testimony of the injured party alone, because she is an accomplice, these authorities will not apply in a case of carnal abuse of a female under sixteen years of age, because she cannot be an accomplice, but is a victim: *Whitaker v. Commonwealth*, 95 Ky. 632.

The defendant having asked for the change of venue, it was not reversible error to make the order for the change in his absence: *Polk v. State*, 45 Ark. 165.

Is the fact that the record does not affirmatively show that the defendant was present when the verdict was returned into court by the jury ground for reversal in this case?

Section 2185 of Sandels and Hill's Digest provides: "If the indictment be for a felony, the defendant must be present during the trial. If he escapes from custody after the trial has commenced, or, if on bail, shall absent himself during the trial, the trial may either be stopped, or progress to a verdict, at the discretion of the prosecuting attorney, but judgment shall not be rendered till the presence of the defendant is obtained." Before

the passage of this statute, it was held in *Brown v. State*, 24 Ark. 620, "that, in prosecutions for felony the defendant must be personally present at each and every trial when any step is taken by the court in his cause, and that the record must affirmatively show the fact": Citing *Sweeden v. State*, 19 Ark. 209; *Sneed v. State*, 5 Ark. 431; 41 Am. Dec. 102; *Cole v. State*, 10 Ark. 318. In *Bearden v. State*, 44 Ark. 331, this ruling is approved, and it is said the defendant is not called upon to show prejudice, but that it is sufficient if it appears he might have lost an advantage or been prejudiced by the proceedings. ^{see} But in the *Bearden* case it affirmatively appears that the defendant was absent when the proceedings complained of were had.

The old rule that, in a felony case, the judgment will be reversed unless the record affirmatively shows that the defendant was present when every substantive step was taken in his case is still adhered to in many states. And this is the common-law rule: See *Clark's Criminal Procedure*, sec. 148, p. 424, and cases there cited. But we see from the above section (*Sandels & Hill's Digest*, sec. 2185) that, while it is the right of the defendant on trial for a felony to be present when any substantive step is taken by the court in his case, yet, if he abscond after the trial commences, or, if on bail, he absent himself during the trial, the trial may progress to a verdict in his absence. It does not appear here that the defendant was not on bail, and that his absence was not voluntary. The offense was a bailable offense, and the record entries, while they show nothing as to the absence or presence of the defendant, are in such language as that it might be inferred that he was present. If on bail, he was not required to be present when the verdict was rendered; and, if voluntarily absent, he cannot complain that the verdict was received in his absence. Under this statute (*Sandels & Hill's Digest*, sec. 2185), if his absence was not voluntary, but enforced, he should show the fact, for, until the contrary is shown, it will be presumed that the defendant was present, or that he was voluntarily absent. "All reasonable intendments will be made in order to support the verdict where the record contains nothing sufficient to justify its overthrow, and this doctrine is nothing more than a reasonable application of the general rule that a breach of sworn duty must be clearly shown": *Elliott's Appellate Procedure*, sec. 724.

"Where the record shows the presence of the accused at the opening of the trial, it has been held that ^{see} it will be presumed that he was present throughout the entire proceedings": *Elliott's Appellate Procedure*, secs. 291, 725; *Welsh v. State*,

126 Ind. 71; *People v. Sing Lum*, 61 Cal. 538; *Carper v. State*, 27 Ohio St. 572; *Bond v. State*, 23 Ohio St. 349; *Bartlett v. State*, 28 Ohio St. 669. "The general presumption is, that the judgment of a judicial tribunal is supported by whatever is essential to its validity and effectiveness, . . . where their lack of support does not appear affirmatively": *Elliott's Appellate Procedure*, sec. 718. "*Omnia praesumuntur rite et solemniter esse acta donec probetur in contrarium*": *Coke on Littleton*, 355.

It would have been an easy matter, if the defendant was prevented from being present, by confinement in jail or otherwise, at the time the verdict was returned into court, for him to have shown the fact, and embodied the evidence in his bill of exceptions. This he did not do, and we must presume that he was voluntarily absent, or that he was present when the verdict was returned.

Let the judgment be affirmed.

RAPE—CONSENT—CONVICTION WITHOUT CORROBORATION—ACCOMPLICE.—A female under the age of consent is incapable of yielding consent to sexual intercourse: *State v. Miller*, 42 La. Ann. 1186; 21 Am. St. Rep. 418. Convictions for rape have been had upon the sole testimony of a child: See monographic note to *Smith v. State*, 80 Am. Dec. 369, on rape. A defendant may be convicted for incest with his daughter upon her testimony alone, as she is not an accomplice: *Whittaker v. Commonwealth*, 95 Ky. 632.

TRIAL—CHANGE OF VENUE—CRIMINAL CASES.—At common law the venue in a criminal case may be changed on application of the prisoner: *State v. Albee*, 61 N. H. 423; 60 Am. Rep. 325.

APPEAL—PRESENCE OF PRISONER UPON RENDITION OF VERDICT.—The failure of the record to show that a person accused of crime was present in court when the verdict of guilty was rendered against him, is fatal to the verdict and judgment: Note to *Summeralls v. State*, 58 Am. St. Rep. 249.

CASES
IN THE
SUPREME COURT
OF
CALIFORNIA.

FIRST NATIONAL BANK v. ERRECA.

[116 CALIFORNIA, 81.]

A CHATTEL MORTGAGE ON SHEEP DOES NOT INCLUDE THE WOOL THEREON nor their increase in gestation at the date of the mortgage, where neither such wool nor increase was specially mentioned in the instrument, though the statute authorizes the execution of such mortgages upon sheep and the increase thereof.

Gibson & Titus, J. C. Hizar, and J. W. Ballard, for the appellants.

Victor Montgomery, for the respondent.

⁸² **HARRISON, J.** The plaintiff brought this action for the foreclosure of a chattel mortgage upon two thousand three hundred and thirty sheep, that had been executed to its assignors January 18, 1894, by the defendants, ⁸³ Erreca and Barrandeguy. In April, 1895, the mortgagors had sold to the defendant, Bruschi, fourteen thousand pounds of wool that had been grown upon the sheep described in the mortgage, after its execution, and sheared therefrom by the mortgagors; and in May, 1895, they sold to the defendant, Cassou, eight hundred and fifteen lambs that had been born from the mortgaged sheep subsequent to its execution. The court held that the wool and the lambs thus sold were covered by the mortgage, and rendered judgment directing their sale. From this judgment Bruschi and Cassou have appealed.

In *Shoobert v. De Motta*, 112 Cal. 215, 53 Am. St. Rep. 207, it was held that in this state the lien of a chattel mortgage upon

domestic animals does not cover the increase of the animals, unless expressly mentioned therein. The provision in section 2955 of the Civil Code, authorizing the execution of a chattel mortgage upon "sheep, and the increase thereof," does not extend the lien of a mortgage upon "sheep" to the "increase" of the sheep, but implies that unless the increase is covered by the terms of the mortgage, it is not included therein. In that case it was also said: "If the mortgagor retains the possession of the mortgaged property, he is at liberty to deal with and use it as its owner, and whatever income or profit may be derived from such use belongs to him, and not to the mortgagee." In *Simpson v. Ferguson*, 112 Cal. 180, 53 Am. St. Rep. 201, it had been held that the mortgagor of real property was entitled to whatever crops might grow upon the mortgaged property prior to a foreclosure, and it was also said in *Shoobert v. De Motta*, 112 Cal. 215, 53 Am. St. Rep. 207: "If, in the case of sheep, the use to which the mortgagor puts the ewes is for breeding lambs, there can be no sufficient reason given why the lambs that are dropped by the ewes should belong to the mortgagee any more than the wool which is sheared from their backs." The present case presents a question which was not involved or decided in that case, i. e., whether the lien of the mortgage includes ⁸⁴ lambs in gestation at its date; but upon the principles of that case it must be held that they are not so included. As the lien of the mortgage extends only to the property described therein, and as the mortgagor remains the owner of the property mortgaged, he has an unrestricted right to sell or dispose of its fruit or increase. His right to dispose of lambs in gestation or wool upon the backs of the sheep at the date of the mortgage is the same as would be his right to dispose of oranges which were on the trees, or wheat which was in the ground or standing in the field when a mortgage of the land was made.

The superior court erred in holding that the wool sheared from the sheep and their increase was covered by the mortgage and subject to its lien, and it is directed to modify its judgment in accordance with this opinion.

Van Fleet, J., and Garoutte, J., concurred.

Hearing in Bank denied.

CHattel Mortgage of Animals—COVERS INCREASE, WHEN.—A mortgage of animals does not extend to their subsequently begotten increase where, as in California such mortgage is

a lien only, and is not a conveyance of the legal title: *Shoobert v. De Motta*, 112 Cal. 215; 53 Am. St. Rep. 207, and note. A chattel mortgage of sheep includes their wool as between the parties, but after such wool is clipped and sold to a purchaser for value without notice, he gets a good title free from the lien of the mortgage: *Willard v. Ostrander*, 51 Kan. 481; 37 Am. St. Rep. 294.

GARDNER v. SAMUELS.

[116 CALIFORNIA, 84.]

PRACTICE—DEMURRER FOR MISJOINDER, FORM OF.—A demurrer stating that the defendant interposing it and the other defendant named therein are improperly joined as parties defendant is sufficient to raise the question of their misjoinder. It is not necessary to state why the pleader conceives their joinder to be improper.

COVENANT TO PAY FOR IMPROVEMENTS DOES NOT RUN WITH THE LAND.—If a lessor of real property covenants that his lessees may erect improvements thereon, and that the lessor, his heirs, and administrators, or assigns will pay such lessee therefor at the expiration of the lease, the covenant does not run with the land, and a grantee thereof is not liable to the lessee for such improvements. The liability of the lessor upon the covenant is personal.

LIEN FOR IMPROVEMENTS MADE BY A LESSEE.—A covenant by a lessor to pay the lessee for improvements erected during the term does not, though enforceable against the lessor personally, create any lien upon the land subject to the lease and upon which the improvements were made and of which they have become a part.

PRACTICE.—A DEMURRER FOR MISJOINDER OF PARTIES DEFENDANT CANNOT BE SUSTAINED when interposed by a defendant who is a proper party to the action and against whom the complaint states a sufficient cause, though it does not disclose a cause of action against the other defendant. It is only when the complaint states some ground of relief against each defendant, and the claims against them are improperly joined in one suit, that each has a right to demur on the ground that the other is improperly joined with him.

Henry C. Gesford, H. M. Barstow, and Dinkelspiel & Gesford,
for the appellant.

F. E. Johnston, for the respondent.

⁸⁶ **HARRISON, J.** The plaintiff leased from the defendant, Samuels, November 18, 1886, a tract of land in Napa county for the term of three years from May 2, 1887, and entered into possession of said land at the commencement of the term, and at its expiration, May 2, 1890, surrendered the premises to the plaintiff. The lease contained the following agreement: "It is further mutually covenanted and agreed by and between said parties that said party of the second part may, at any time, prior to the going into effect of this lease, go upon ⁸⁷ said premises to make such

improvements as he shall deem necessary, and said party of the first part, for himself, his heirs, administrators, and assigns, agrees to pay unto said party of the second part, at the expiration of this lease, for any and all improvements placed upon said premises by said party of the second part, not to exceed the sum of fifteen hundred dollars," with provision for the determination of the value by agreement or by arbitration. In pursuance of this agreement the plaintiff made certain improvements of a permanent nature upon the land, which, at the expiration of the term, were of the value of two thousand two hundred dollars. The defendant, Morris, became the owner of the land on the tenth day of November, 1891, and since that time has been the owner, and in possession thereof, and before he purchased the same had full notice that the plaintiff had made these improvements, and also of the agreement by Samuels to pay him therefor, and of his failure to make such payment. At the expiration of the term Samuels refused to agree with the plaintiff upon the value of the improvements or to pay him anything therefor, and in April, 1894, the plaintiff requested Samuels, and also the defendant, Morris, to submit the determination of their value to arbitration, as provided in the lease, and named an arbitrator therefor, but they each refused either to submit the same to arbitration or to pay for said improvements. Plaintiff thereupon brought the present action to recover from Samuels the sum of fifteen hundred dollars, and that it be decreed to be a lien upon the land so leased, and for a sale thereof in satisfaction of said lien. The defendants severally demurred to the complaint for want of facts to constitute a cause of action, and also for a misjoinder of parties defendant, each specifying in his demurrer that he was improperly joined with the other. The court sustained the demurrers, and from the judgment entered thereon the plaintiff has appealed.

1. The demurrer was sufficient in form. Each of the ⁸⁸ defendants distinctly specified therein that the ground of his demurrer for misjoinder of parties defendant was that he was improperly joined with the other defendant. It was not necessary to incorporate into the demurrer an argument in support thereof, or to state therein the reasons why such misjoinder was improper. A demurrer couched in the language of the statute would have been insufficient: *O'Callaghan v. Bode*, 84 Cal. 489; but a demurring party, by designating the defendants who are improperly joined with him, sufficiently calls the plaintiff's attention to his objection to the complaint.

2. The demurrer of the defendant Morris was properly sustained. The agreement of Samuels to pay the value of the improvements was not a covenant which could be enforced against one who purchased the land after the breach of such agreement. There was no covenant on the part of the plaintiff to make any improvements. He was merely given the permission to do so, and the agreement of Samuels was only for the payment of money therefor. Such an agreement is personal, and does not bind the assignee of the reversion: *Bream v. Dickerson*, 2 Humph. 126. Section 1466 of the Civil Code declares: "No one, merely by reason of having acquired an estate subject to a covenant running with the land, is liable for a breach of the covenant before he acquired the estate, or after he has parted with it or ceased to enjoy its benefits": See, also, *Bailey v. Richardson*, 66 Cal. 416. Upon the breach of this agreement the plaintiff had merely a right of action against Samuels which was purely personal, and which was not assumed by Morris when he subsequently became the owner of the land. Nor did the agreement of Samuels have the effect to give to the plaintiff a lien upon the land for the security of this payment. It was held in *Ecke v. Fetzer*, 65 Wis. 55, in an action of ejectment, that a covenant by which the lessor agreed that at the expiration of the term he would pay for improvements that should be placed upon the land by the ^{so} tenant during the term, bound an assignee of the lease, "who took the assignment of the lease during the term, and received rent as such assignee during said term," and that the tenant was entitled to retain possession of the leased premises until such payment should be made. This right in the tenant existed, however, not by virtue of a lien on the land for the value of the improvements, but upon the principle that the landlord, having agreed to pay for the improvements, could not maintain ejectment and compel their delivery until such payment was made. If the tenant surrenders the possession, he cannot afterward claim a lien thereon as against a subsequent purchaser from the landlord. In *Fowler v. Mutual Life Ins. Co.*, 28 Hun, 195, the trustees of a trust estate made an agreement with their lessee that at the expiration of the term he should be paid for certain improvements which he might make upon the property, but did not bind themselves for its payment, and it was held that, as the trustees made the agreement only in their representative capacity, the trust estate was bound therefor, and the lessee was entitled to have the amount decreed to be a lien upon the trust estate. This was the applica-

tion of a well-known rule of equity, and differs essentially from the principles governing the present case. The parties could have inserted in their lease an agreement that the value of the improvements should be a lien upon the land to be secured thereby, but their omission to do so implies that such was not their intention, and the plaintiff is therefore deprived of the right to such lien. In the absence of an agreement to that effect, a tenant has no lien upon the leased land for improvements placed thereon under an agreement with the landlord to pay for the same at the expiration of the term: *Hite v. Parks*, 2 Tenn. Ch. 375; *Taylor v. Baldwin*, 10 Barb. 582; *Coffin v. Talman*, 8 N. Y. 465; *Beck v. Birdsall*, 19 Kan. 550.

3. The complaint sufficiently states a cause of action against the defendant Samuels. It is urged by the respondent, however, that the demurrer of Samuels was ⁹⁰ properly sustained by reason of the misjoinder of Morris with him as codefendant. The provision authorizing a demurrer for the misjoinder of parties defendant is taken from the system of equity pleading which formerly prevailed. Under that system such demurrer could be interposed only by the party who was improperly made a defendant. A defendant against whom there was a sufficient complaint could not object that others who had no interest in the subject matter of the suit were made defendants, unless it also appeared that his interests were affected thereby: *Story's Equity Pleading*, sec. 544; *Beach's Modern Equity Practice*, secs. 80, 254; *Cherry v. Monro*, 2 Barb. Ch. 618. This ground of demurrer is authorized by the code of Missouri, and it is held in that state that the former rule in equity is to be followed: *Ashby v. Winston*, 26 Mo. 210. Another rule of pleading prescribed by the code which is also taken from the equity system is the provision of section 379 of the Code of Civil Procedure: "Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein." The "controversy" here referred to is the claim for relief made by the plaintiff against the defendants, which he sets forth in his complaint. In the present case this claim is to have the amount of his demand against Samuels for the value of the improvements placed upon the land declared to be a lien thereon, and to have the land sold for its payment. As Morris is alleged to have an interest in the land, he is a necessary party to the determination of such an action, and he cannot be said to be im-

properly joined as a defendant, even though the complaint does not sufficiently state a cause of action for affirmative relief against him. If the relief sought by a plaintiff by reason of the cause of action as framed in his complaint would render all of the persons named as defendants proper parties to entitle him to such relief, a defendant against whom a sufficient cause of action is stated cannot ²¹ demur for misjoinder of defendants because the complaint does not sufficiently state a cause of action against another defendant. "It is only where the complainant has some ground of relief against each defendant, and where his claims for relief against them respectively are improperly joined in one suit, so as to make the bill multifarious, that each defendant has the right to demur upon the ground that the other defendants are improperly joined with him in the suit": *Cherry v. Monroe*, 3 Barb. Ch. 618. In an action to foreclose a mortgage, the mortgagor cannot demur for the misjoinder of a defendant whose alleged claim does not appear to constitute a lien upon the mortgaged lands, nor can the maker of a promissory note demur to a complaint against him and the indorser for the misjoinder of the indorser, because the complaint fails to state facts sufficient to bind the latter.

The judgment is reversed, and the court below is directed to overrule the demurrer of the defendant Samuels, with leave to him to answer within such time as it may designate.

Van Fleet, J., and Garoutte, J., concurred.

COVENANTS—WHEN RUN WITH THE LAND.—Covenants which are connected with the estate run with the land, and vest in point of benefit and liability in an assignee: *Hickey v. Lake Shore etc. Ry. Co.*, 51 Ohio St. 40; 46 Am. St. Rep. 545, and note. See, also, *Bald Eagle etc. R. R. Co. v. Railroad Co.*, 171 Pa. St. 284; 56 Am. St. Rep. 807, and monographic note to *Ladd v. Boston*, 21 Am. St. Rep. 434-503, on covenants restricting the use of land.

PRACTICE—MISJOINDER OF PARTIES AS GROUND FOR DEMURRER.—A complaint stating a cause of action against the defendant personally, and also against him as executor and administrator, no joint liability being shown, is demurrable for misjoinder of parties defendant: *Schlicker v. Hemenway*, 110 Cal. 579; 52 Am. St. Rep. 116. If objection to improper joinder of defendants is not taken by demurrer it is deemed to be waived: *Bensieck v. Cook*, 110 Mo. 173; 33 Am. St. Rep. 422, and note. See, also, *Great West Min. Co. v. Woodmas etc.*, 12 Colo. 46; 13 Am. St. Rep. 204.

LEE v. SOUTHERN PACIFIC RAILROAD COMPANY.

[116 CALIFORNIA, 97.]

CONSTITUTIONAL LAW—LEASING OF RAILWAYS.—A constitutional provision that the legislature shall not pass any law permitting the leasing or alienation of any franchise so as to relieve the franchise or property held thereunder from the liability of the lessor or grantor contracted or incurred in the operation, use, or enjoyment of such franchise is a restriction upon the power of the legislature, and prevents a corporation possessing a franchise from saving it harmless from any liability by conveying it to some other corporation, but it does not create a personal liability against a corporation where none existed before.

RAILWAYS—LIABILITY OF LESSOR TO EMPLOYEES OF LESSEE.—A railway corporation leasing its road to another corporation, by which it is subsequently operated, is not liable to an employe of the lessee corporation for injuries sustained by him through the negligence of his employer or of the latter's servants or agents.

RAILWAY, LEASE OF WITHOUT AUTHORITY.—A railway lease of its road made without statutory authority is void, and the lessee, if it operates the road, must be deemed to do so as the agent of the lessor.

RAILWAYS LEASE BY, WHEN DOES NOT RELIEVE FROM LIABILITY.—A lease of a railway, though authorized by statute, does not relieve the lessor from liability for any injury resulting from the negligent omission of a duty owed by it to the public, such as the proper construction of its road, stationhouses, etc., unless such statute expressly exempts it from liability.

RAILWAYS—LIABILITY OF LESSOR TO EMPLOYEES OF LESSEE.—If a brakeman in the employment of a lessee railway corporation is injured through negligence of the lessor corporation in improperly constructing its railway and track, and such defectively constructed track remains out of repair, inadequate, and unsafe, he may recover of the lessor for the injuries so sustained by him.

PLEADING, VARIANCE, WHEN IMMATERIAL.—If the plaintiff avers himself to have been an employe of the defendant corporation at the time he received certain injuries through its negligence in the construction and maintenance of its track, he may recover though he was not such employe, but was an employe of another corporation operating the road under a lease from the defendant, if the negligence was of a character for which he was entitled to recover, though not as an employe of the defendant. The averment of the employment may be eliminated from the complaint and still leave therein facts sufficient to warrant a recovery against the defendant.

Cole & Cole, and Del Valle & Munday, for the appellant.

Bicknell & Trask, for the respondent.

HENSHAW, J. Plaintiff brought this action against the Southern Pacific Railroad Company to recover damages for personal injuries sustained by him. He pleaded that the defendant was the owner of a certain railroad in the county of Los Angeles, and of its roadway, tracks, and appurtenances; that at the time

of the injuries complained of he was employed by the defendant as a brakeman, and that while in the performance of his duties as brakeman at a siding called Honby, on the line of the road, he was thrown from an engine upon which he was riding and sustained serious injuries. The cause of the accident was alleged to be the negligence of the defendant in imperfectly constructing the rails and track of the road at Honby, and in allowing this defectively constructed track to remain out of repair, inadequate, and unsafe.

The answer admitted the ownership by defendant of the road in question, denied that defendant was engaged ¹⁰⁰ in the business of operating the road, denied that plaintiff was or ever had been in its employ as a brakeman, or in any other capacity, and denied the imperfect construction and want of repair of the rails and track.

The jury returned a general verdict in favor of plaintiff in the sum of eight thousand dollars.

It likewise made special findings of fact upon certain interrogatories presented. These findings, with certain other facts agreed to by counsel under stipulation, may thus be summarized: The defendant was the owner of the railroad upon which the accident complained of occurred, but prior to the time of the accident it had leased the road and all the rolling stock and property of every kind used upon or in connection with it to the Southern Pacific Company of Kentucky. The Southern Pacific Company was at the time of the accident in the exclusive operation of said railroad under the lease. The sidetrack upon which the accident occurred had been constructed by the Southern Pacific Company as an aid or adjunct to the main line, but was the property of the defendant corporation. The plaintiff at the time of the accident was in the employ of the Southern Pacific Company, and not of the Southern Pacific Railroad Company. The trial court determined that a conflict existed between the special findings and the general verdict, and, holding that under the special findings defendant was entitled to judgment, rendered its decision accordingly.

Section 10, article 12, of the constitution, declares: "The legislature shall not pass any law permitting the leasing or alienation of any franchise so as to relieve the franchise or property held thereunder from the liability of the lessor or grantor, lessee or grantee, contracted or incurred in the operation, use, or enjoyment of such franchise, or any of its privileges."

Upon this language appellant contends that the constitution gives one a right of action against the corporation which has owned property for an injury which has resulted to him in the use of such property in the ¹⁰¹ hands of a lessee or grantee of the original owner, and from this he insists that his right of action against the defendant is established by the constitution itself.

The section in question was adopted by the constitutional convention without debate. It is a provision peculiar to this state. It has not so far received judicial interpretation; yet we think no difficulty need be experienced in arriving at its true meaning. It is not to be construed as a grant of authority to lease, but as a restriction upon the power of the legislature to make such grant of authority: *Abbott v. Johnstown etc. Horse R. R. Co.*, 80 N. Y. 27; 36 Am. Rep. 572; *Central etc. R. R. Co. v. Morris*, 68 Tex. 49.

It declares: 1. That if a lease or sale shall be made of the franchise or property of a corporation, the lessee or grantee shall take such franchise or property cum onere, subject to any of the liabilities of the grantor at the time existing and enforceable against the franchise or property. This provision is for the very obvious purpose of preventing a corporation, by selling or assigning its franchise or property, from saving harmless the franchise or property, and leaving remediless one who but for the lease or sale could have enforced against the property a judgment which he might recover. It is designed further as a declaration that the forfeiture of a franchise for an act committed or omitted by the charter corporation while it owned such franchise may be enforced after transfer of the franchise by sale or lease. 2. That in the hands of the lessee or grantee the franchise or other property shall be subject to the liabilities which may be incurred in its occupation, use, or enjoyment. Thus the corporation owning the property will not be allowed to save it harmless by conveying it to another corporation. In the hands of the operating corporation the franchise and property will still be liable, the one to forfeiture at the instance of the state, the other to execution levy at the instance of any individual who has sustained loss or injury by reason of the wrongful acts of the operating corporation.

¹⁰² But it will be noted that the section does not attempt to give, and it is not intended to give, a personal action against a corporation where none existed before. It is designed to subject the franchise and property of a corporation, whether the fran-

chise be exercised, or the property be used, by the corporation itself, or by another, to liability for breach of duty. Otherwise a corporation might own a fully equipped railroad; it might convey the road and the property used upon and with it to a lessee corporation owning no property whatsoever, and leave the conduct and operation of its property entirely to the lessee. A judgment creditor seeking to make good his claim against the operating company would find no property owned by it upon which it could levy. To prevent this, and many other such evasions as might be instanced, the constitutional provision in question was adopted.

So far as the case at bar is concerned, it can have but this application and no other. It would enable the plaintiff injured by the negligence of his employer, the lessee company, to make good his judgment, under appropriate procedure, out of the leased property, but it would not operate to give the plaintiff, an employé of the lessee company, a right of action against the lessor company, upon the fiction that it was his employer.

Respondent contends that, having made a valid lease of all its railroad property to the Southern Pacific Company, it is absolved from all liability to plaintiff. Upon the part of the appellant, it is contended that the lease is without sanction from the constitution and laws of the state, and is, therefore, void. The question of the validity or invalidity of the lease is thus collaterally presented, but a decision upon it is not necessary to a determination of the rights of the parties hereto. If the lease were made without legislative sanction, it would be void, and under all of the authorities the lessor would continue liable for all the negligence of the lessee affecting the public, the latter being treated as operating the ¹⁰³ road as the mere agent of the lessor: *Arrow-smith v. Nashville etc. R. R. Co.*, 57 Fed. Rep. 165; *Thomas v. Railroad Co.*, 101 U. S. 83; *New York etc. R. R. Co. v. Winans*, 17 How. 30; *Railroad Co. v. Brown*, 17 Wall. 445; *Frazier v. Railway Co.*, 88 Tenn. 138; *Ohio etc. R. R. Co. v. Dunbar*, 20 Ill. 623; 71 Am. Dec. 291; *Central etc. R. R. Co. v. Morris*, 68 Tex. 49; *Nelson v. Vermont etc. R. R. Co.*, 26 Vt. 717; 62 Am. Dec. 614. But, conceding all that respondent claims as to the validity of the lease, it does not follow that respondent is relieved from liability to this plaintiff. The act which it is insisted affords legislative authority for the lease in question, is entitled "An act permitting and authorizing railway and other corporations organized under the laws of this state, or of any state or

territory of the United States of America, or any act of Congress of the United States of America, to do business in this state on equal terms." It is found in the Statutes of 1880, at page 21. No terms of the act afford exemption in any respect to the lessor company. Where a statute authorizing leases contains no clause exempting the lessor from liability, it is well settled that the lessor still remains liable for an injury resulting from the negligent omission of a duty owed by it to the public, such as the proper construction of its road, stationhouses, etc.

In *St. Louis etc. Ry. Co. v. Curl*, 28 Kan. 622, a railway company constructed its track, and in the construction omitted to make sufficient cattle-guards where the track entered and left a field. Thereafter the railroad was leased to another company, which, at the time of the injury complained of, was in full possession and use of the track, and, by the terms of its lease, had contracted to discharge all statutory obligations and duties imposed upon the lessor company. The owner of land adjacent to the railroad brought his action against the lessor company to recover damages for injuries sustained to his crops by straying cattle. Justice Brewer, in delivering the opinion of the court, said: "Defendant contends that where the statute authorizes the lease by one ¹⁰⁴ railroad company to another of its track, the lessor company is not responsible for injuries caused by the torts of the lessee company, and in support of that doctrine cites some authorities. To a certain extent this proposition is true; if the injury results from negligence in the handling of trains or in the omission of any statutory duty connected with the management of the road, matters in respect to which the lessor company could in the nature of things have no control, then the lessee company will alone be responsible; but when the injury results from the omission of some duty which the lessor itself owes to the public in the first instance—something connected with the building of the road—then we think the company assuming the franchise cannot divest itself of responsibility by leasing its track to some other company. Thus, for instance, in the case at bar, the defendant was charged with the duty of placing sufficient cattle-guards before it either used this track which it constructed or permitted anyone else to use it; and it cannot divest itself of responsibility from injuries resulting from such omission by leasing its track to some other company. The injury resulted directly from its own wrong, and not from any mere negligence on the part of the *St. Louis & San Francisco*

Railroad Company. It cannot relieve itself by contracting with some other party to discharge its statutory duty. . . . The defendant omitted this duty, and by the statute is responsible for all damages sustained by reason of such omission."

In *Nugent v. Boston R. R. Co.*, 80 Me. 62, 6 Am. St. Rep. 151, the defendant railroad, under express authority of law, had leased its road to the Portland & Ogdensburg Railroad, which latter road was engaged in its management and operation. A brakeman of the Portland & Ogdensburg road sued defendant for personal injuries received by reason of the negligent construction of an awning at a stationhouse built by defendant company. The case received elaborate consideration; the action of the brakeman against the owning road ¹⁰⁵ was sustained, and the rule deduced in the following language: "Herein, as we think, lies the true distinction which marks the dividing line of the lessor's responsibility. In other words, an authorized lease without any exemption clause absolves the lessor from the torts of the lessee resulting from the negligent operation and handling of its trains, and the general management of the leased road over which the lessor could have no control. But for an injury resulting from the negligent omission of some duty owed to the public, such as the proper construction of its roads, stationhouses, etc., the chartered company cannot, in the absence of statutory exemption, discharge itself of legal responsibility."

In *Arrowsmith v. Nashville etc. R. R. Co.*, 57 Fed. Rep. 165, the same rule is enunciated, and numerous authorities cited in support thereof. Indeed, a somewhat extended examination of the cases justifies the conclusion that this principle at least is accepted without conflict. An analysis of the case of *East Line etc. Ry. Co. v. Culbertson*, 72 Tex. 375, 13 Am. St. Rep. 805, a case upon which respondent strongly relies, will disclose that the law there enunciated is not only not at variance with the principle above mentioned, but embodies a distinct recognition of it. In that case an employé of the operating company sued the lessor company, claiming damages for injuries sustained by reason of defective appliances furnished by the operating company. The court held, and very properly, that such an action would not lie against the lessor company, and said: "It may be that, if the injury had occurred by reason of a defect in the roadbed or track, and not by reason of a defect in the engine, the company charged with the duty of keeping up the road would be liable. But if it were true that the injury was caused entirely by another com-

pany operating the owner's road, and was inflicted upon one of its employes by reason of a defect in machinery entirely under its control, it is difficult to see upon what principle of policy or justice the lessor should be held liable merely because it owned the road."

¹⁰⁶ In all cases where a valid lease is found (or, as in this discussion, where it is assumed) the lessor company owes no duty whatsoever as an employer to the operatives of the lessee company. The claim of the relationship of employer and employe under such circumstances is a false claim and quantity. It does not exist. The responsibility of the lessor company when it attaches does not spring from this relationship, but arises from a failure of the lessor company to perform its duty to the public, of which public the employe of the operating company may be regarded as one. Thus in those cases where the injury has resulted to an employe of the operating company by reason of the negligence of a fellow-servant, or of want of skill and care of the lessor company in managing the road, or in negligence in furnishing suitable appliances, these and kindred matters being entirely and exclusively within the control of the lessee company, for injury which may result the lessor is in no way responsible. But where injury has resulted to an employe of the operating company by reason of a failure of the lessor to perform its public duty, as in its failure to construct a safe road, as is here charged, the injured employe may sue the lessor company as one of the public for its failure to perform that duty, and not because between himself and the lessor company the relation of employe and employer, or any relation of contractual privity, exists. As is said in *Nugent v. Boston R. R. Co.*, 80 Me. 62, 6 Am. St. Rep. 151, where the brakeman of the lessee road was injured by reason of the defective construction of the stationhouse by the charter company: "Our opinion, therefore, is that the plaintiff had the lawful right as brakeman on the train of the P. & O. to pass and re-pass by the Bethlehem stationhouse of the defendant, which therefore owed a duty to him to construct and maintain its stationhouse there in such a reasonably safe manner that its awning would not injure him while in the performance of his duty with due care, and that a negligent breach of that duty by the defendant having resulted in a personal ¹⁰⁷ injury to the plaintiff without fault on his part, he is entitled to maintain this action therefor."

So here, the charge against the defendant is, that the injury resulted by reason of its imperfect construction and maintenance

of the rails and track of its road. The verdict of the jury for plaintiff is its declaration that the charge was substantiated by the evidence, and the nature of the omission or dereliction is such as to entitle the plaintiff to compensation from the defendant herein for injuries which may have resulted to him by reason of it.

As has been indicated, the plaintiff in this case has averred that he was an employé of the defendant corporation. The proofs in this regard disclose that he was in the employ of the Southern Pacific Company. The variance we think to be immaterial. The averment could be eliminated, and a cause of action would still remain. Plaintiff has pleaded and shown to the satisfaction of the jury that he was not a trespasser upon the railroad at the time and place where he met with his injury, but that he was there under lawful employment; that in pursuit of his vocation he met with an injury occasioned by defendant's defective construction of its roadbed, for which injury the defendant is in law responsible.

It follows that there is no irreconcilable conflict between the special findings and the general verdict of the jury, and the court should, therefore, have entered judgment for plaintiff. The judgment is reversed, and the cause remanded with instructions to the trial court to enter judgment in favor of plaintiff and appellant under the general verdict of the jury.

Temple, J., and McFarland, J., concurred.

Hearing in Bank denied.

Beatty, C. J., dissented from the order denying a hearing in Bank.

Liability of Lessor Railway Corporations to Persons Other Than The Lessee.

In a note on the right to transfer public franchises we have stated principles and cited authorities which go far toward determining the liability of lessor railway corporations while their lines are being operated under a lease. We there showed that public franchises were, in the absence of express statutory authority, deemed non-transferable, for the reason that they were held to constitute public trusts, carrying with them the duty of the performance of such trusts, and hence that liability for the performance of such duty could not be cast exclusively upon another, unless with the consent of the sovereign, and that the principles forbidding the absolute transfer of such franchises were equally applicable to leases thereof: *Note to Brunswick etc. Co. v. United Gas etc. Co.*, 35 Am. St. Rep. 290-407.

It follows from the rules stated above that a lease of a public franchise not authorized by the legislature is void. The lessee, in pursuance of his void lease, may be placed in possession of railway property and permitted to assume the duties of the lessor. The former, because the lease is invalid, occupies toward the latter, in so far as it permits him to assume the duties of the lessor, the position of a mere agent, and the lessor therefore remains answerable as a principal and liable as such for all breaches of public duty to the same extent as if the leasing had not been attempted: *Lee v. Southern Pac. Ry. Co.*, 116 Cal. 97; ante, p. 140; *Singleton v. Southwestern etc. Ry. Co.*, 70 Ga. 464; 48 Am. Rep. 574; *Ohio etc. Ry. Co. v. Dunbar*, 20 Ill. 623; 71 Am. Dec. 291; *Ottawa etc. Ry. Co. v. Black*, 79 Ill. 262; *Abbott v. Johnstown etc. R. R.*, 80 N. Y. 27; 36 Am. Rep. 572; *Lakin v. Railroad Co.*, 13 Or. 436; 57 Am. Rep. 25; *Wabash etc. R. R. Co. v. Peyton*, 106 Ill. 534; 46 Am. Rep. 705; *Central etc. R. R. v. Morris*, 68 Tex. 49; *Arrowsmith v. Nashville etc. R. R. Co.*, 57 Fed. Rep. 165; *Pennsylvania Ry. Co. v. St. Louis etc. Ry. Co.*, 118 U. S. 290; *Chattanooga etc. R. R. Co. v. Liddoll*, 85 Ga. 482; 21 Am. St. Rep. 169; *Thomas v. Railroad Co.*, 101 U. S. 71; *New York etc. R. R. Co. v. Winans*, 17 How. 30; *Railroad Co. v. Brown*, 17 Wall. 445. Though the road is operated under an unauthorized lease and in the name of the lessee, the lessor remains answerable for substantially the same acts and omissions as if it were in fact operating the road and no lease thereof had been attempted. It is, therefore, answerable to a passenger for injuries received by him from the negligence of the employes of the lessee: *International etc. Ry. Co. v. Underwood*, 67 Tex. 589; *Fisher v. West Virginia etc. R. R. Co.*, 39 W. Va. 366; or for an assault committed on him in unlawfully ejecting him from a train: *Bicketts v. Chesapeake etc. R. R. Co.*, 33 W. Va. 433; 25 Am. St. Rep. 901. It is also liable for the refusal of its lessee to receive goods for transportation: *Central etc. R. R. Co. v. Morris*, 68 Tex. 49; or for negligence whereby such goods, after being received for transportation, are exposed to damage: *Ohio etc. R. R. Co. v. Dunbar*, 20 Ill. 623; 71 Am. Dec. 291; or are destroyed while in the custody of the lessee for transportation, whether such destruction can be shown to have resulted from negligence or not: *Grand Tower etc. Co. v. Ullman*, 89 Ill. 244. The lessor corporation also remains liable for the killing of stock under circumstances which would have exposed it to liability if the lease had not been made: *Nelson v. Vermont etc. Co.*, 26 Vt. 717; 62 Am. Dec. 614; *Fontaine v. Southern etc. R. R. Co.*, 54 Cal. 645. With respect to employes of the lessee corporation the lessor is answerable to them for injuries resulting to them from the track being permitted to become or remain in an unsafe condition for the operation of the road: *Nugent v. Boston etc. R. R. Co.*, 80 Me. 62; 6 Am. St. Rep. 151. There is one case which seems not altogether reconcilable with the rules just stated. It holds that a lessor corporation is not liable to a passenger for injuries received by him while entering or departing from the cars from the condition of the track at the particular place at which his entry or departure was attempted, though it was expressly stated in the pleadings that the lessee corporation was permitted by the

lessor corporation to receive him as a passenger at such place. The court, however, construed the pleadings as containing an admission that the place at which the passenger was received by the lessee corporation was not one at which he would have been entitled to be received as such by the lessor corporation, had it continued in the operation of the road, and it held that, as the lessor was not under any duty to make this unusual place safe for the reception of passengers, it did not incur any liability for such unsafeness while the road was in the hands of its lessee, though the latter, in fact, undertook to receive the passenger there: *Murch v. Concord R. R. Co.*, 20 N. H. 9; 61 Am. Dec. 631.

In the cases to which we have heretofore referred, as there was no authority of law for the lease of the railway, the contract purporting to lease it was necessarily, at least as to all persons not parties thereto, inoperative, and the plaintiff seeking indemnity for injuries suffered either through the negligence of the assumed lessee or from the failure to discharge the duty resting on the corporation to receive and transport freight and passengers, had a right to disregard the purported lease, and to pursue the railway corporation which was by law charged with the duty of operating the railway. We shall now refer to a very different class of cases, namely, those in which it appears that the leasing was authorized, because some statute permitting or ratifying it is produced, or the plaintiff has by his pleadings conceded the validity of the lease. With respect to cases of this class, the authorities, considering the great importance of the question, must be regarded as meager, and there can be no doubt that they are conflicting. We shall not, therefore, undertake to assert that any definite rule has, up to this time, been established, but we shall refer to the authorities, as far as we have been able to discover them, dealing with this subject. On the one hand, it is insisted, that though a railway corporation has been authorized to lease its road and to permit its lessee to enter into the control or operation thereof, yet that, in the absence of further special statutory exemption, the lessor railway company remains liable substantially as before for the mode in which the railway is operated. The principal case makes a distinction which appears to be a very just one between the duties owed by the lessor corporation to the public and duties not falling within this classification, and affirms that "where a statute authorizing leases contains no clause exempting the lessor from liability, it is well settled that the lessor still remains liable for an injury resulting from the negligent omission of a duty owed by it to the public, such as the proper construction of its road, stationhouses, etc." The court therefore held that the plaintiff, though an employé of the lessee corporation, was entitled to recover of the lessor for injuries sustained by him while in the performance of his duties as a brakeman through the imperfect construction of the rails of the track of railway owned by the lessor, and which it allowed to remain out of repair, inadequate, and unsafe: *Lee v. Southern Pac. R. R. Co.*, 116 Cal. 97; ante, p. 140. Probably there is no substantial dissent, except it be by the courts of New York, from the rule thus

stated, holding the lessor corporation liable notwithstanding the lease for the performance of its duties to the public, though there has doubtless been a difference of opinion as to the cases which fall within the rule. Thus in a state, the inclination of whose courts has been in favor of exempting the lessor corporation from liability, it has nevertheless been held that a railway company over a portion of whose track another company runs its trains by virtue of a contract, is liable in tort to the latter's brakeman who, without fault of himself or his coemployés, receives a personal injury while in the performance of his duty on his employer's train solely by reason of the negligent construction of the former's depot. The court said that the only materiality which attached to the contract between the railway companies was to make it certain that the plaintiff was lawfully, and not a trespasser, on the defendant's road, and that although the contract between the companies provided that the lessee assumed all liability and risk of accident arising from defects of the roadbed, track, or default of its employés, "nothing was thereby added to the defendant's legal obligation and duty. These terms do not express all which the law requires of railroad companies as to the reasonable safety of its stationhouses. It is common learning that as a compensation for the grant of its corporate franchise intended in large measure to be exercised for the public good, the common law imposed upon the defendant a duty to the public, independent of contract and coextensive with its lawful use, to keep its road and its appurtenances in a reasonably safe and proper condition. If the cause of action were a breach of the contract, the plaintiff could not maintain an action thereon for want of privity. But this is an action *ex delicto*, for an injury caused by a neglect of a duty created by law, and for the neglect of such a duty, privity is not essential to the maintenance of an action of tort therefor." Further speaking upon the same subject, the court said: "And herein, as we think, lies the true distinction which marks the dividing line of the lessor's liability. In other words, an authorized lease without any exemption clause absolves the lessor from the torts of the lessee resulting from the negligent operation and handling of its trains and the general management of the leased road, over which the lessor could have no control. But for an injury resulting from the negligent omission of some duty owed to the public, such as the proper construction of its road, stationhouses, etc., the charter company cannot, in the absence of statutory exemption, discharge itself of legal responsibility: *Nugent v. Boston etc. R. R. Co.*, 80 Me. 62; 6 Am. St. Rep. 151. The rule was stated in substantially the same terms by Judge Brewer, when a member of the supreme court of Kansas, in an opinion which sustained a recovery by the plaintiff for injuries received through the loss of his pasture and from damages to his crops by the straying of cattle thereon, through the failure to maintain sufficient cattleguards at the place where the railway entered his field. The court said: "Defendant contends that where the statute authorizes the lease by one railroad company to another of its track, the lessor company is not responsible for injuries caused by the torts of the lessee company, and in support of that doctrine cites some au-

thorities. To a certain extent this proposition is true; if the injury resulted from negligence in the handling of trains or in the omission of any statutory duty connected with the management of the road, matters in respect to which the lessor company could, in the nature of things, have no control, then the lessee company will alone be responsible; but when the injury results from the omission of some duty which the lessor itself owes to the public in the first instance—something connected with the building of the road—then, we think the company assuming the franchise cannot divest itself of responsibility by leasing its track to some other company. Thus, for instance, in the case at bar, the defendant was charged with the duty of placing sufficient cattleguards before it ever used this track which it constructed, or permitted any one else to use; and it cannot divest itself of responsibility for injuries resulting from such omission by leasing its track to some other company": *St. Louis etc. R. R. Co. v. Curl*, 28 Kan. 622.

The duty to transport freight upon demand has been held by the supreme court of Texas to be a public duty, relief from which cannot be had by the leasing of a railway, and therefore a railway corporation remains liable for a breach of this duty, though it has by authority of law leased its road to another corporation which is engaged in the operation thereof: *Central etc. R. R. Co. v. Morris*, 68 Tex. 49; *International etc. R. R. Co. v. Kuehn*, 70 Tex. 582; *East Line etc. R. R. Co. v. Lee*, 71 Tex. 538.

There are undoubtedly cases that go farther than those we have cited, and indicate that a lessor corporation is liable even for the negligence of its lessee in the operation of the road. Thus a suit was maintained by a lessor corporation by an employé of the lessee corporation for the negligence of one of its servants in requiring the plaintiff to propel a hand-car into a cut with high embankments on either side at about the time a train was due to pass, and, upon observing the approach of such train, ordering the hand-car upon which plaintiff was riding to be stopped and removed by him and other employés from the track, such hand-car being then struck with such violence by the approaching train as to cause injury to the plaintiff. The court held that the exemption of the lessor corporation from liability must appear in some statute by express terms, and that "no matter how many leases and subleases may be made, the law attaches to the actual exercise of the privilege of carrying passengers and freight the compensatory obligation to the public to use ordinary care for the safety both of persons and property so transported," and that a carrier "who simply substitutes, with the consent of the state, another in his place cannot establish his own right of exemption from responsibility for the wrongs of the substitute, unless he can show not only explicit authority to lease the property, but to rid itself of such responsibility. Where the legislature gives its express sanction to the release of the lessor company from liability, there can be no question that it is exempt": *Logan v. North Carolina R. R. Co.*, 116 N. C. 940, 948; *Tillett v. Norfolk etc. Ry. Co.*, 118 N. C. 1031.

If it be true, as the decisions with substantial unanimity admit, that a lessor railway remains liable for the discharge of its duties to the public unless expressly exempted therefrom by statute, it seems difficult to conceive its absence of liability in any event, except, perhaps, where the plaintiff is suing upon an express contract made with him by the lessee corporation. Is it not as much a public duty on the part of a railway corporation to operate its trains without negligence as it is to receive all freight offered for transportation, or to carry all passengers who offer to pay the regular rates, or to keep its track and stationhouses in safe condition? In truth, we do not know of any duties of a railway corporation which are of a private character. It has been held that a lessor railway is answerable to a third person injured by the negligence of its lessee in the management of its trains: *Driscoll v. Norwich etc. R. R. Co.*, 65 Conn. 230; also for injuries to passengers resulting for a like cause: *Macon etc. R. R. Co. v. Mayes*, 49 Ga. 355; 15 Am. Rep. 678; *Chicago etc. R. R. Co. v. Meech*, 163 Ill. 305; *Braslin v. Somerville Ry. Co.*, 145 Mass. 64. In another case a lessor corporation was held answerable for the negligence of its lessee in the operation of a train whereby the plaintiff's cattle were run over and killed: *Harmon v. Columbia etc. R. R. Co.*, 28 S. C. 401; 13 Am. St. Rep. 686. In Georgia a railway corporation is answerable for an injury to a passenger through the negligence or carelessness of its lessee in ejecting him from the train: *Singleton v. Southwestern R. R. Co.*, 70 Ga. 464; 48 Am. Rep. 574.

If a statute imposes upon railway corporations the duty of fencing the track in a particular manner, they are not released therefrom by a lease of their property assented to, or ratified by, statute, and, therefore, if through the failure to perform such duty, cattle stray upon the track and are injured while the road is being operated by the lessee corporation, the lessor is jointly and severally liable with the lessee therefor: *Illinois Central Ry. Co. v. Kanouse*, 39 Ill. 272; 80 Am. Dec. 307; *Toledo etc. Ry. Co. v. Rumbold*, 40 Ill. 143; *Fort Wayne etc. Ry. Co. v. Hinebaugh*, 43 Ind. 354; *Pittsburgh etc. Ry. Co. v. Bolner*, 57 Ind. 572; *Stephens v. Davenport etc. R. R. Co.*, 36 Iowa, 327; *Bay City etc. Ry. Co. v. Austin*, 21 Mich. 390; *Harmon v. Columbia etc. R. R. Co.*, 28 S. C. 401; 13 Am. St. Rep. 686. A lessor railway corporation remains under the duty of keeping its track in such a condition as not to inflict unnecessary injury upon third persons. If, therefore, it permits its track or right of way to be overgrown with weeds or otherwise occupied by highly combustible material, through which a fire is spread to the lands of an adjacent proprietor, inflicting injury upon him, it is answerable therefor, though such track was at the time in the control of a lessee corporation: *Balsley v. St. Louis etc. R. R. Co.*, 119 Ill. 68; 59 Am. Rep. 784; *Bean v. Railroad Co.*, 63 Me. 295; *Davis v. Providence etc. Ry. Co.*, 121 Mass. 134. So it has been held that both the lessor and the lessee of a railway track are jointly liable for the unlawful use of its right of way, whereby premises of the plaintiff adjoining such way are injured, and damage is otherwise inflicted upon him: *Backus v. Detroit etc. Ry. Co.*, 71 Mich. 645.

We shall now refer to decisions which, while they do not deny that a lessor railway corporation, unless expressly exempted by statute, remains liable for the discharge of its public duties, have so applied the rule as to exempt them from liability for negligence in the management and operation of trains by their lessees. It would seem that to carry passengers without such negligence as would result in their personal injury was one of the public duties of railway corporations, and therefore that they would be answerable for the discharge of such duties, though their roads were being operated by lessees. In the case of *Arrowsmith v. Nashville etc. R. R. Co.*, 57 Fed. Rep. 165, the plaintiff, as administrator of one Martin, sued to recover for injuries causing the death of his intestate while traveling as a United States railway mail clerk over the road of the defendant, then being operated by another railway corporation under a lease. Notwithstanding the intestate was riding over the road in his capacity as railway clerk and without payment of fare, the court treated him "as in all respects a passenger for hire." The alleged cause of the injury to the decedent was that a crane was placed too close to the passing train, and the track of the defendant company opposite the crane was out of repair, whereby the car as it passed was made to careen toward the side on which the crane was, "thus bringing it into such proximity to the arm of the crane as to strike the decedent standing in the door, as he was obliged to do, to take the pouch from the crane." There was no allegation that the crane was placed in this position by the lessor corporation before making the lease, nor that the track of the roadway was not in good repair. The statutes of the state authorized the leasing of railways, and imposed upon the lessee all liabilities in favor of the state or general public imposed by charter or general law upon the lessor corporation, but there was no provision in the statute either expressly continuing the liability of the lessor corporations or exempting them therefrom. The court, after a thorough review of the authorities upon the subject, held the lessor corporation not to be liable, and said: "Where obligations are imposed by charter or statute law upon a railroad company for the protection and advantage of the general public not having contract relations with it, it may very well be said that a general authority to lease out its road, which contains no provision exempting it from such public obligations, will not absolve it from liability. So, if a railway be in such condition that it is a nuisance, when leased out, by reason of the absence of something necessary to its safe operation, or the presence of something dangerous to its safe operation, and this nuisance be continued by the lessee, both the lessor and the lessee would be liable, the one as having created, and the other as having continued, a nuisance. But to say that, after the lessor has, by authority of law, transferred the control and management of its road to another, he shall, unless specially exempted, remain liable for all the torts and contracts of the lessee, is to ignore the contract of lease and the legislative sanction under which it was made. The state, on grounds of public policy, may well refuse its consent to the transfer; but, if it consent, then there is no public policy

to authorize the courts to say that the responsibility for the future management and operation of the road has not been exclusively imposed on the lessee as the lawful substitute for the company owning the road. The duty to carry the plaintiff's intestate with the highest degree of care and skill did not rest upon any charter requirement, or spring from any general statutory law of the state. The duty was imposed by operation of common law upon the contract of carriage. The right to maintain this action arises from the contract relation of carrier and passenger. If intestate had been carried safely, there would be no right of action by reason alone of the defective condition of the road. The duty to keep the road in repair is like the duty to furnish a safe vehicle. Each arises from the relation of carrier and passenger. Each is imposed upon a lessee company by necessary legal effect of the assumption of the carrier's duty." The principles of this decision were referred to in *Hayes v. Northern etc. R. Co.*, 74 Fed. Rep. 279, which, however, was an action by an employé and not by a passenger of the lessee corporation. The courts of the state of New York have proceeded at least as far, and perhaps farther, than any other in exempting lessor corporations from liability. Thus in *Dichett v. Spuyten Duyvil etc. R. R. Co.*, 67 N. Y. 425, it was held that a recovery could not be had by a plaintiff suing as administrator for injury caused by his intestate's falling into a cut made by the defendant for the purposes of its railway, such cut having been by the lessor inclosed by substantial fences before the making of the lease, which were permitted to become out of repair by the lessee corporation. The court applied to the case the ordinary rule that a lessor of premises who parts with them while they are in proper condition is not bound to see that they are thereafter properly cared for, and is not responsible for their subsequent condition. In *Miller v. New York etc. R. R. Co.*, 125 N. Y. 118, the principle of the decision last cited was reaffirmed, and applied against a plaintiff suing a lessor railway corporation for injuries resulting to him as an adjacent landowner by so filling in an embankment near his land that in times of rains and melting snow, sand and earth washed and flowed thereon, this embankment being constructed by the lessee railway corporation. An action of trespass was brought for an assault upon plaintiff in expelling him from a train running over the line of the defendant railroad, but it appeared that such road was then operated by another corporation under a lease. The judgment in favor of the plaintiff was reversed on the ground that the action did not proceed upon any negligence or carelessness of the defendants or their agents or servants, or from the violation of any obligation or duty prescribed or enjoined by the defendants' statute. The plaintiff was a passenger over the road, and it was held by the court that the obligation of safe transportation and the duty of proper treatment devolved upon the lessee corporation alone, and that the liability for a breach of this duty, if any, was incurred by that corporation, that the defendants in the case were strangers to the contract for the transportation of the passenger, and that there was no privity between the defendants and the

plaintiff, nor did any arise by implication of law or in consequence of any contract between the two railroad companies, and, finally, that the lessee corporation became the owner pro hac vice of the road leased, and was alone liable for damages of the character here in question: *Mahoney v. Atlantic etc. R. R. Co.*, 63 Me. 68.

As to employes of a lessee corporation, the weight of authority, whether the lease is authorized or not, is to the effect that they cannot recover for injuries received through the negligence of such lessee or its servants or agents: *Virginia etc. Ry. Co. v. Washington*, 86 Pa. St. 629; *Hukill v. Maysville etc. R. R. Co.*, 72 Fed. Rep. 745. The duties which are owed by a railroad company to its servant are not duties owed to him in common with the public, but grow out of the contract of service. He assumes the relation of servant to his employer voluntarily, and out of it arise the reciprocal obligations from one to the other. It seems to us that the relation of the servant of the company operating the road to the owner is very different from his relation to his employer, and that the relation of the owner of the road to him is different from its relation to the general public. His contract is not with the company owning the road; and it may be asked, Does the latter owe him the duty of a master to his servant, or guarantee that the master with whom he has voluntarily contracted will perform its obligation to him? It may be that if the injury had occurred by reason of a defect in the roadbed or track, and not by reason of a defect in the engine, the company charged with the duty of keeping up the road would be liable. But if it were true that the injury was caused entirely by another company operating the owner's road, and was inflicted upon one of its own employes by reason of a defect in machinery entirely under its control, it is difficult to see upon what principle of policy or justice the lessor would be held liable merely because it owned the road": *East Line etc. Ry. Co. v. Culberson*, 72 Tex. 375; 13 Am. St. Rep. 805. The doctrine of the principal case, however, that the lessor railway company owes to the employes of the lessee, as well as to the public generally, the obligation of keeping its tracks in a safe condition for the operation of trains over them, is generally conceded, and therefore such employes may recover from the lessor corporation for injuries resulting to them from the failure to discharge those obligations: *Nugent v. Boston etc. R. R. Co.*, 80 Me. 62; 6 Am. St. Rep. 151; *Trinity etc. R. R. Co. v. Lane*, 79 Tex. 643; *Galveston etc. R. R. Co. v. Daniels*, 9 Tex. Civ. App. 253.

If a statute provides that railroad corporations shall be responsible to the owners of property injured by fire communicated by locomotive engines of any railroad corporation, the effect of this statute is to impose upon every corporation owning a railway a liability for injuries thus done by locomotives upon their track, and this liability is not lessened by a lease of such track to another corporation which is in the operation and control thereof at the time the injury is inflicted: *Stearns v. Atlantic etc. R. R. Co.*, 46 Me. 117, though in such cases the lessee also seems to be liable: *Pierce v. Concord etc. Ry. Co.*, 51 N. H. 590.

In some states statutes authorizing the leasing of railways have specially provided that, notwithstanding such leasing, the lessor corporation shall remain answerable as before: *Brown v. Hannibal etc. R. R. Co.*, 27 Mo. App. 394; *McKay v. Kansas City etc. R. R. Co.*, 36 Mo. App. 445. Statutes and constitutional provisions of this character, as was determined in the principal case, do not, however, increase the liability of the lessor corporation, but simply leave it answerable for its failure to perform the duties imposed upon it by law: *Lee v. Southern Pac. R. R. Co.*, 116 Cal. 97; *ante*, p. 140.

CARVER v. STEELE.

[116 CALIFORNIA, 116.]

SURETIES AND INDORSERS ARE NOT RELEASED by the failure of the creditor to enforce a mortgage or other lien which he has taken to secure the payment of his debt.

MORTGAGE, ACTION AGAINST SURETIES OR INDORSERS WITHOUT FORECLOSURE.—Though a statute declares that there shall be but one action for the recovery of a debt secured by a mortgage, in which action the security shall first be exhausted, it does not prevent the maintenance of an action by the mortgagee against the sureties or indorsers of the mortgagor, because their promise is not secured by the mortgage.

William F. Gibson, for the appellant.

Olney & Olney, for the respondents.

118 BRITT, C. On March 18, 1889, one Staples borrowed of one Montgomery a sum of money; to secure its repayment Staples and S. B. Steele executed their promissory note payable in ninety days to E. W. Steele, who indorsed the same to Montgomery; as between Staples and the Steeles they were sureties for him in this transaction. As further security for the loan, Staples and his wife executed to Montgomery a mortgage, in form a bargain and sale deed, of a tract of land which was subject to a prior mortgage in favor of John and Louisa Bauerle. Finding that he would be unable to pay said note when due, Staples agreed with Montgomery for an extension of time of payment, and on May 27, 1889, pursuant to such agreement, he executed to Montgomery a new note for the same sum payable August 27th after date, which was indorsed by the Steeles; thereupon the first note was surrendered and canceled. Staples entered into no new express engagement relative to the mortgage, though the court found an "understanding" that it should secure the new note. February 16, 1892, John and Louisa Bauerle commenced an action for the foreclosure of their prior mortgage against said land making Montgomery a party defendant; he made default, and,

on October 31, 1892, the land was sold under judgment of foreclosure in that action to satisfy the debt due the Bauerles, and in due time a sheriff's deed was issued to the purchaser. Subsequently to this judgment, Montgomery assigned the said note of May 27, 1889, to the plaintiff here, Minnie A. Carver, who brought the present action to recover the amount thereof from E. W. and S. B. Steele as indorsers. The defense—sustained by the court below—is that Montgomery discharged Staples, the maker of the note, and consequently the indorsers, by failure to set up and foreclose his junior mortgage in the suit brought by the Bauerles to enforce their prior lien.

Conceding the point contended for by respondents, though without intimating any opinion on the subject, that the mortgage continued to be a security for the ¹¹⁹ payment of the renewed note in the hands of Montgomery at the time of the Bauerle foreclosure, we yet fail to discern that he was under legal compulsion to assert the same in order to hold the indorsers. In general, unless some agreement or special circumstance imposes diligence upon the creditor as a duty, he does not, by mere failure to pursue the person primarily liable, discharge the guarantor, surety, or indorser, even though his passivity in this regard may result in barring his remedy against the original debtor: *Whiting v. Clark*, 17 Cal. 407; *Bull v. Coe*, 77 Cal. 54, 60; 11 Am. St. Rep. 235. Accordingly, the rule is, that the creditor loses no rights against the indorser, whose liability has become fixed, by simple failure to enforce his lien against property mortgaged for security of the debt: *First Nat. Bank v. Wood*, 71 N. Y. 405; 27 Am. Rep. 66; *Hoover v. McCormick*, 84 Wis. 215; *Fuller v. Tomlinson*, 58 Iowa, 111; *Colebrooke on Collateral Securities*, sec. 241, and cases cited. It is a familiar provision of our statutes that there can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real estate or personal property, which action must be first directed to the exhaustion of the security (Code Civ. Proc., sec. 726), and it is the theory of respondents that in virtue of this section the effect of Montgomery's default in the Bauerle suit was to preclude him from maintaining any personal action against Staples for the recovery of his debt; they cite *Brown v. Willis*, 67 Cal. 235, where it was so held; and hence, they say, that the maker being released, the indorsers are released. Admitting that *Brown v. Willis*, 67 Cal. 235, was correctly decided, it does not reach respondents' case; their contract to pay Montgomery was not the

same as that of Staples; "the promise of the maker of a note is one thing, and the promise of an indorser is another"; and their promise was not secured by the mortgage held by Montgomery: *Vandewater v. McRae*, 27 Cal. 596, 603. And, as the authorities referred to above show, the loss of personal remedy against the ¹²⁰ maker, or of the lien upon the mortgaged property, following as a consequence of mere inaction on the part of the holder, is of no moment in the case. The court therefore erred in holding that the indorsers had been released, and the judgment and order appealed from should be reversed.

Belcher, C., and Searls, C., concurred.

For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed.

Temple, J., McFarland, J., Henshaw, J.

SURETYSHIP—DISCHARGE OF SURETY—FAILURE OF CREDITOR TO APPLY OTHER SECURITIES HELD BY HIM.—If the maker of a note gives a chattel mortgage to secure its payment, the fact that the mortgagor disposes of some of the mortgaged chattels, and the mortgagee takes no measures to recover them, does not release the surety on the note, if the mortgagee consented to the disposition of the property by the mortgagor: *Thorn v. Pinkham*, 84 Me. 101; 30 Am. St. Rep. 335, and note. See also, *Noble v. Murphy*, 91 Mich. 653; 30 Am. St. Rep. 507, and note; *First Nat. Bank v. Wood*, 71 N. Y. 405; 27 Am. Rep. 66; *Mingus v. Daugherty*, 87 Iowa, 86; 43 Am. St. Rep. 354.

DUFF v. RANDALL.

[116 CALIFORNIA, 226.]

A CONVEYANCE MADE BY AN ATTORNEY in fact in fraud of the rights of his principal is not void. A bona fide purchaser from the grantee therein without notice of the fraud acquires an indefeasible title.

EXECUTION SALES, PURCHASERS AT ARE PROTECTED FROM SECRET EQUITIES.—One who purchases at an execution sale and pays the purchase price is from that moment entitled to be regarded as an innocent purchaser, though the judgment debtor retains the right to redeem during a period specified by the statute. Such purchaser is not affected by equities of which he had no notice at the payment of his bid, though notice thereof was brought home to him before he became entitled to a deed.

W. L. Duff, J. W. Turner, and L. D. McKisick, for the appellants.

Buck & Cutler, for the respondents.

²²⁷ HARRISON, J. Ejectment for certain lands in the county of Humboldt.

The title to the property in question was vested in William R. Duff in 1863, and upon his death, in 1875, the plaintiffs herein succeeded to his interest in the property as his heirs at law. In 1869 he, by his attorney, conveyed the property to Robert P. Duff, who mortgaged it to Huntoon July 19, 1877. In an action by these plaintiffs against Robert P. Duff (the facts of which are found in *Duff v. Duff*, 71 Cal. 513), it was determined that by reason of the fraud of the attorney, this conveyance did not have the effect to divest William R. Duff of his title thereto. William R. Duff had, however, given to his attorney authority to convey the property, and, although the conveyance was invalid as against William R. Duff and the plaintiffs herein, it was not absolutely void, and a bona fide purchaser for value from the grantee would hold the title as against William R. Duff, or as against the plaintiffs herein. The facts relating to the controversy between the parties hereto are substantially the same as those presented in the case of *Randall v. Duff*, 79 Cal. 115. The material difference between the present action and that is, that in that action it was shown that the suits for the foreclosure of the mortgages executed by Robert P. Duff to Ritchie and Fiebig were not commenced until after the commencement of the action of *Duff v. Duff*, 71 Cal. 513, and after a notice of the *lis pendens* had been filed in the office of the county recorder; whereas, in the present case, it was shown that the suit of *Duff v. Duff*, 71 Cal. 513, was not commenced until after the property involved herein had been sold to the defendant Randall under the judgment in the foreclosure suit. The suit of *Duff v. Duff*, 71 Cal. 513, was commenced by the plaintiffs herein December 30, 1880. The ²²⁸ action to foreclose the Huntoon mortgage was begun August 14, 1880, and judgment was rendered therein October 28, 1880. November 30, 1880, the sheriff sold the property under this judgment to the defendant Randall, who paid the purchase price therefor and received a certificate of sale the same day. The sheriff's deed was executed to Randall August 18, 1881, and on August 8, 1882, Randall conveyed the property to the defendants Murphy and McAleenan. Neither Randall nor either of the other defendants herein had any notice of the plaintiffs' claim to the property until after the filing of the notice of *lis pendens* in the suit of *Duff v. Duff*, 71 Cal. 513. The present action was begun December 12, 1894.

The decision in *Randall v. Duff*, 79 Cal. 115, was given in favor of the plaintiffs herein upon the ground that, by reason of the commencement of the action of *Duff v. Duff*, 71 Cal. 513, before the commencement by Ritchie of his action to foreclose, the purchaser under the judgment in that action had notice of the plaintiffs' claim, and purchased subject to their rights; but it was said in the opinion given upon the rehearing in that case: "If Ritchie had foreclosed without notice of William Duff's interest in the mortgaged estate, the foreclosure would have cut off his right of redemption, for precisely the same reason that the mortgagee subjected his estate to a lien—for the reason, that is to say, that no man can be allowed to mislead another to his injury." It is contended by the appellants herein, however, that this expression in the opinion is not conclusive of the present appeal, for the reason that the foreclosure of a mortgage is not complete until the time for redemption has expired and the sheriff's deed has been executed to the purchaser, and that Randall did not receive the sheriff's deed until after the commencement of the action of *Duff v. Duff*, 71 Cal. 513. In support of this proposition counsel for appellants have cited expressions in some opinions to the effect that the term "foreclosure" implies the execution of the sheriff's deed, as well as the sale under the judgment,²²⁹ and argue therefrom that in the present case the Huntoon mortgage was not foreclosed at the time the suit of *Duff v. Duff*, 71 Cal. 513, was commenced. An examination of these cases, however, will show that in none of them was such a proposition decided by the court, and that the language used in the opinions was merely in the nature of an illustration. In *Goldtree v. McAllister*, 86 Cal. 104, it was used for the purpose of showing that when proceedings are instituted for the foreclosure of a mortgage, where the mortgaged property is situated in more than one county, the sale, as well as the deed to be executed thereunder, is to be made by the sheriff of the county in which the judgment was given, rather than that there should be several sales by the sheriffs of the different counties. The case of *National Bank v. Union Ins. Co.*, 88 Cal. 497, 22 Am. St. Rep. 324, merely holds that if a mortgagee buys in the property at the foreclosure sale, and a loss by fire occurs before the execution of the deed, there is not such a change of title as to deprive him of the right to the insurance money. It was said in *Siehler v. Look*, 93 Cal. 600: "The effect of the sale is of itself to extinguish the right and claim of all the defendants in the action acquired subsequent to the

date of the mortgage, and to vest in the purchaser the title of the mortgagor at the date of the mortgage, discharged of all such right and claim"; and in *Randall v. Duff*, 79 Cal. 115, it was said: "The apparent title being in Robert P. Duff, a defendant in the foreclosure suits, we think that a purchaser at the sheriff's sales for value, and without notice, would take as good a title as if he had purchased directly from Robert P. Duff and taken a deed from him."

Although the right of a mortgagor to redeem the mortgaged premises is not cut off until the expiration of the time allowed for redemption, yet the purchaser at a sale under the judgment rendered in the foreclosure suit acquires the same interest in the property sold as does a purchaser in property sold under an ordinary money judgment. "Upon the sale the purchaser acquires all ³³⁰ the right, title, interest, and claim of the debtor thereto" (Code Civ. Proc., sec. 700), and only the right to redeem from this sale is left in the mortgagor. If a redemption is made by the mortgagor, it is not from the lien of the mortgage, but from the sale under the judgment, and the amount which he is required to pay under such redemption is not the amount of the mortgage, but the amount for which the property was sold. Prior to the entry of the judgment the mortgagor holds the title to the property subject to the lien of the mortgage, and after the judgment is entered, and before the sale, he holds it subject to the lien of the judgment; but after the sale he has only a right of redemption, while the purchaser has the entire beneficial interest in the property, subject to be defeated by a redemption from the sale: "The execution of the deed gives to the purchaser at the sale no new title to the land purchased by him, but is merely evidence that his title has become absolute": *Robinson v. Thornton*, 102 Cal. 680. "The purchaser obtains an inchoate right which may be perfected into a perfect title without any further act than the execution of a deed in pursuance of a sale already made. It is not a mere right to have a certain sum charged upon the property satisfied out of it. The sum before charged upon the land has already been satisfied by the sale to the extent of the amount bid and paid by the purchaser. The purchaser has already bought the land and paid for it. The sale is simply a conditional one, which may be defeated by the payment of a certain sum by certain designated parties within a certain limited time. If not paid within the time the right to a conveyance becomes absolute without any further sale, or other act to be performed by

anybody": Page v. Rogers, 31 Cal. 301. The purchaser is entitled to all the rents and profits of the property sold, or the value of its use and occupation from the time of the sale until the redemption (Code Civ. Proc., sec. 707), and, if no redemption is made, he is entitled to retain these rents and profits without any obligation to account therefor to the mortgagor.

²³¹ Strictly speaking, however, there could have been no "foreclosure" of the plaintiffs herein in the suit upon the Huntoon mortgage. A foreclosure is limited to the mortgagor and those claiming under him, while the plaintiffs herein claim by title superior to both the mortgagor and the mortgagee in the action on the Huntoon mortgage, and in the respect that their title is paramount thereto it would not be affected by that suit; but to the extent that they are estopped as against the mortgagee or the purchaser at the sale under his judgment from questioning the validity of the mortgagor's title, they are bound by the judgment as fully as if they had been made parties to the suit, and the extent of this estoppel is measured by the notice of their claim, given by them or by their predecessor. This is the purport of the decision in Randall v. Duff, 79 Cal. 115. To the extent that William R. Duff held his attorney out to the world as authorized to convey the land, these plaintiffs are as much estopped as he would have been to assert any rights against a bona fide purchaser for value, under a conveyance made by the attorney. A purchaser of real property at an execution sale stands in the same position as any other purchaser from the judgment debtor, and the certificate of sale which he receives from the sheriff is a conveyance within the meaning of the recording act, by which he is protected from the unrecorded claims of others, of which he did not have notice. In Foorman v. Wallace, 75 Cal. 552, certain property standing of record in the name of a judgment debtor had been purchased by the defendant at a sale under execution against him, but more than two years prior to the sale the judgment debtor had conveyed the property to the plaintiff. At the time of the purchase by the defendant this conveyance had not been recorded, but was recorded prior to the execution of the sheriff's deed. To the contention of the plaintiff that the sale by the sheriff was inoperative as against his unrecorded deed, the court said: "The transfer is not perfect until the execution and delivery of the sheriff's deed, but by the doctrine ²³² of relation the deed when thus executed is to be deemed and taken as though executed at the date when the lien, of which it is the sequence,

originated," and held that the defendant's title obtained at the sheriff's sale was superior to that of the plaintiff under his unrecorded deed: See, also, *Stewart v. Freeman*, 22 Pa. St. 120; *Atwood v. Bearss*, 45 Mich. 469; *McMurtrie v. Riddell*, 9 Colo. 497; *Byers v. Engles*, 16 Ark. 543. By virtue of the principles thus declared, the title acquired by Randall under his purchase at the sheriff's sale must prevail over that held by the plaintiffs, of which he had no notice until after he had paid the purchase money, and received the certificate of sale. He is fully protected in this purchase, and his right to this protection is the same whether he received the notice of the plaintiff's claim before or after the execution of the sheriff's deed. He was a bona fide purchaser for value before the notice was given, and his rights cannot be affected by any notice given thereafter.

The judgment and order are affirmed.

Garoutte, J., and Van Fleet, J., concurred.

Hearing in Bank denied.

AGENCY—ESTOPPEL OF PRINCIPAL TO DENY AGENTS' AUTHORITY.—He who holds out another as his agent to act for him in a given capacity, and by his habits and course of dealing justifies the inference that such agent is authorized to act as his agent, whether it be in a single transaction or in a series of transactions, will not be allowed to deny the agency to the prejudice of an innocent party who has been led to rely upon the appearance of authority in the agent: *Union Stockyard etc. Co. v. Mallory*, 157 Ill. 554; 48 Am. St. Rep. 341. See, also, *Griswold v. Gebbie*, 128 Pa. St. 353; 12 Am. St. Rep. 878, and note.

EXECUTION—SALE—RIGHTS OF PURCHASERS AS TO SECRET EQUITIES OF WHICH NO NOTICE WAS HAD.—A purchaser at an execution sale who pays the amount of his bid without notice of a vendor's lien against the property purchased, though he receives notice of such lien before he becomes entitled to the sheriff's deed, is not affected by the lien, and it cannot be enforced against him: *Maroney v. Boyle*, 141 N. Y. 462; 38 Am. St. Rep. 821, and note. Execution purchasers, equally with subsequent innocent purchasers, are protected against unrecorded deeds: *Lusk v. Reed*, 86 Fla. 418; 51 Am. St. Rep. 32, and note.

BRACKETT v. BANEGAS.

[116 CALIFORNIA, 278.]

HOMESTEAD.—A JUDGMENT TO WHICH A WIFE IS NOT A PARTY foreclosing a mortgage upon the homestead, though her rights accrued after the execution of the mortgage, is void as against her, and a purchaser at the sale thereunder acquires no title whatever.

MORTGAGE, SECOND SUIT TO FORECLOSE.—If a judgment foreclosing a mortgage is void because the mortgagor's wife is not a party thereto, and the property is a homestead, and the court in which action is brought has lost the right to set aside such judgment on motion, a second suit may be maintained to which the wife, as well as the husband, is a party, to set aside the former judgment and the proceedings thereunder and to foreclose the mortgage.

JUDGMENTS—RELIEF WILL BE GRANTED IN EQUITY against a judgment after the remedy by motion in the original action is no longer available, if no laches are imputable to the plaintiff.

JUDGMENT—RELIEF IN EQUITY—LACHES.—A plaintiff who employs an abstract company to search the records before bringing an action to foreclose a mortgage, and who, because of the failure of such company to report to him the filing of a claim of homestead, neglects to make the wife of the mortgagor a party thereto, and who for more than six months after the entry of the judgment in the action remains ignorant of such homestead claim, is not guilty of such laches as preclude him from maintaining, in equity, a suit against the wife and her husband to set aside the judgment and the proceedings thereunder and to foreclose the mortgage.

REGISTRY ACTS DO NOT AMOUNT TO ACTUAL NOTICE. The recording of a claim of homestead is not equivalent to actual notice to a mortgagee of such claim, nor does it preclude him from maintaining a second suit to foreclose a mortgage on the homestead on the allegation and proof that he omitted to make the wife a party to the former action because of his ignorance of such claim.

J. B. Mannix, for the appellants.

Patterson Sprigg and W. T. McNeally, for the respondent.

²⁸¹ **SEARLS, C.** This is an action to foreclose a mortgage. Plaintiff had a decree. Defendants appeal from the judgment and from an order denying their motion for a new trial. The prominent facts are as follows:

On the 5th of January, 1891, plaintiff brought an action in the superior court in and for the county of San Diego, to foreclose a mortgage executed by the defendant, Manuel Banegas, to secure the payment of a promissory ²⁸² note made by him, the said Banegas, for seventeen hundred dollars.

Before bringing such action, plaintiff, as was the general practice, applied to an abstract company for a search of the records, and received a report that the only encumbrances on the mortgaged property, other than plaintiff's mortgage, was a judgment

lien in favor of one J. M. Lucas. There was, in fact, at the time of such search of record, a declaration of homestead made by defendant, Manuel Banegas (who was a married man, and resided with his family on the premises), upon the mortgaged premises. This was not discovered by the abstract company, and plaintiff, having no knowledge thereof, made Manuel Banegas and J. M. Lucas parties defendant in said action, and did not make Nieves Banegas, who is and was the wife of Manuel Banegas, a party defendant.

A decree of foreclosure was rendered in said action; the mortgaged property was sold thereunder and purchased by plaintiff. The time for redemption was, by agreement between plaintiff and Manuel Banegas, extended for six months, upon the expiration of which time, and no redemption having been had, plaintiff obtained a writ of assistance.

Thereupon, and in April, 1892, defendant moved the discharge of said writ, and set up the homestead record as a cause therefor. This was the first knowledge which plaintiff had of the homestead proceedings. The writ was discharged.

Thereupon plaintiff moved the superior court for an order setting aside the decree in the case and all proceedings subsequent thereto, and for leave to file an amended and supplemental complaint bringing in the wife, Nieves Banegas, as a party defendant.

This motion was granted, but on an appeal therefrom to this court, and from an order refusing to set aside said first order, the orders were reversed, upon the ground that more than six months having expired between the date of the decree and the order setting the ²⁸³ same aside, the court was not, under section 473 of the Code of Civil Procedure, authorized or empowered to make said order: Brackett v. Banegas, 99 Cal. 623. Thereupon plaintiff instituted this action to foreclose the same mortgage, making the wife a party defendant, and setting out in extenso the foregoing facts as ground of equitable relief in addition to the ordinary statement of a cause of action in foreclosure.

The prayer of the complaint also asked that the former judgment, and all subsequent proceedings thereunder, be set aside, which prayer was granted.

The mortgaged property having been made a homestead, the action to foreclose and the decree rendered therein were void as against the wife, who was not made a party thereto: Watts v. Gallagher, 97 Cal. 47. In Revalk v. Kraemer, 8 Cal. 66, 68 Am. Dec. 364, it was held that where a mortgage was executed by the

husband alone upon the homestead, a judgment of foreclosure in an action in which he alone was defendant, neither the rights of the husband or wife were affected by the proceedings. As the homestead rights of the husband and wife can only be foreclosed in an action in which both are made parties, the plaintiff acquired no title under his purchase in the action against the husband alone.

Had plaintiff a right under these circumstances to maintain another action against Manuel Banegas and wife to foreclose? Jones, in his work on Mortgages, at section 1679, enunciates the rule as follows: "If the owner of the equity has, through mistake, not been made a party, the mortgagee who has purchased at the sale may maintain a second action to foreclose the equity of such owner, and for a new sale, but he cannot recover the costs of the previous sale." The author cites the cases of *State Bank v. Abbott*, 20 Wis. 570, *Stackpole v. Robbins*, 47 Barb. 212, and *Shirk v. Andrews*, 92 Ind. 509, in support of the doctrine. The author adds in the same section: "Although a new action is the proper remedy for a foreclosure imperfect through failure to ²⁸⁴ make all persons interested in the equity of redemption parties to the suit, the courts have allowed the original suit to be reinstated upon an amended petition, even after an interval of several years: *Loftin v. Strow* (Ky., Apr. 14, 1887), 4 S. W. Rep. 180.

Courts of equity will not, save in exceptional cases, in a separate action relieve a party from errors of law, but will grant such relief in the original action upon motion or supplemental bill: *Goodenow v. Ewer*, 16 Cal. 461; 76 Am. Dec. 540; *Boggs v. Hargrave*, 16 Cal. 560; 76 Am. Dec. 561. In this case, however, the mistake is not one of law, but of fact. The mistake consisted not in the legal effect of the homestead, but in its existence. In such a case, the original decree having been void for the want of jurisdiction of the court below to enter it without the presence of the wife, or, what is the same thing, such service upon her as required her to appear and defend, if any defense she had, no good reason is perceived why an independent action may not be had to adjust the equities of all the parties. Manuel Banegas is not injured by the institution of the second action. The original judgment against him was for two thousand four hundred and forty-nine dollars and eight cents with costs. The present judgment is for the two thousand four hundred and forty-nine dollars and eight cents, without the cost of the original action and without the conventional interest or any interest thereon from the date

of the original judgment in 1891 until the entry of the judgment herein in 1894, a period of over three years.

Appellant contends that a counsel fee was allowed in the case against the defendant. The mortgage provided for a counsel fee; but we cannot determine from the record that one was allowed.

In *Ede v. Hazen*, 61 Cal. 360, which was a bill in equity for relief against a judgment, brought within five months after the entry of such judgment, the court said: "The assistance of equity cannot be invoked so long as the remedy by motion exists; but when the time ²⁸⁵ within which a motion may be made has expired, and no laches or want of diligence is imputable to the party asking relief, there is nothing in reason or propriety preventing the interference of equity. *Bibend v. Kreutz*, 20 Cal. 109, is to like effect: See, also, *California Beet Sugar Co. v. Porter*, 68 Cal. 369; *Lapham v. Campbell*, 61 Cal. 296; *Baker v. O'Riordan*, 65 Cal. 368.

We are of opinion there was no such laches or want of diligence imputable to plaintiff as will preclude his maintaining the action.

Concede that the mistake of the abstract company was his mistake, and it only proves, as was said in *Sidener v. Coons*, 83 Ind. 183, that "the most careful and expert calculators [persons] make mistakes." Had plaintiff himself examined the records, and failed to ascertain the existence of the homestead filing, it might, with more propriety, be said he was negligent in not calling to his aid persons versed in the business; but when, as was the custom, he called to his aid a company whose business it was to make such examinations, and whom he had a right to suppose was expert in the business, and such examiner accidentally failed to discover the record of homestead, it was, as to plaintiff, and as against the defendants here who are not injured thereby, a mistake without negligence.

Appellants argue at some length the doctrine that the record imparted notice to plaintiff, and, therefore, there is a conclusive presumption of notice on his part as to the homestead having been declared.

This doctrine is correct when applied to purchasers or lienholders upon the property who will be injured by the assertion of ignorance as to the record, but is not applicable to a case like the present. A like question was involved in *Shaffer v. McCloskey*, 101 Cal. 576, and *McFarland, J.*, speaking for the court, dismissed the question with the remark that "the fact that the

deed of trust was recorded is of no value": Citing *Rumpp v. Gerken*, 59 Cal. 496, and *Brooks v. Rice*, 56 Cal. 428, as cases in which the junior mortgages against which ²⁸⁶ relief was sought were of record. The court also quotes from *Pearce v. Buell*, 22 Or. 29, where it is said: "The principle running through all cases of this class, says *Barculo, J.*, *Barnes v. Camack*, 1 Barb. 392, is that when the legal rights of parties have been changed by mistake, equity restores them to their former conditions, when it can be done without interfering with any new rights acquired on the faith and strength of the altered condition of the legal rights, and without doing injustice to other persons": See, also, *Curtis v. Gooding*, 99 Ind. 47.

We have examined the long array of authorities cited by appellants' counsel in support of the proposition that an application for relief from a judgment in this state for excusable neglect can only be had by motion in the action to be had within six months. None of them support the proposition in its entirety. Some of them hold that, where action is taken within six months, it must be by motion, and not by separate action. Others declare that, where a party had knowledge of the grievance complained of in time to have proceeded by motion, and failed to do so, it is such laches as will preclude the maintenance of a separate action.

We should be inclined to hold that, in a case where a valid decree of foreclosure against the mortgagor, and a sale thereunder had been had, omitting from the action a party having rights in the premises, which could only be foreclosed by his being made a party to the action, the proper practice would be to bring such party into the original action by a supplemental bill. But the status of the husband and wife as to the homestead is *sui generis*. A foreclosure as to one of the spouses is ineffectual for any purpose without the joinder of the other, except in those cases where the homestead has a value in excess of five thousand dollars.

The judgment is void so far as the security is concerned, and the purchaser thereunder does not take with notice, as in cases of sales under ordinary execution. Being thus void, a new action may be brought.

²⁸⁷ The contention that the complaint does not ask that the original judgment be set aside, and that the decree herein does not set it aside, is not supported by, but is in direct conflict with the record.

The prayer of the complaint is, "that the said decree, sale, order of sale, and the satisfaction of said judgment be vacated and

set aside," etc. The decree follows in substance the language of the prayer of the complaint.

The findings are supported by the evidence, and we recommend that the judgment and order appealed from be affirmed.

Haynes, C., and Belcher, C., concurred.

For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

McFarland, J., Henshaw, J., Temple, J.

HOMESTEAD—MORTGAGE UPON—FORECLOSURE—RIGHTS OF WIFE.—Judgment of foreclosure against surviving wife, sued solely as executrix of her deceased husband, does not affect her individual rights in the mortgaged premises as a homestead, notwithstanding she sets up in her answer the fact of her declaration of homestead on the property: *Stockton etc. Assn. v. Chalmers*, 75 Cal. 332; 7 Am. St. Rep. 173, and note. The wife's consent is essential to the creation of any lien upon the homestead: *Note to Moran v. Clark*, 8 Am. St. Rep. 87. See, also, *Hibernia Sav. etc. Soc. v. Thornton*, 109 Cal. 427; 50 Am. St. Rep. 52.

JUDGMENTS—WHEN RELIEVED AGAINST IN EQUITY.—Equitable relief is granted where, by accident, mistake, fraud, or otherwise, a party has obtained an unfair advantage in proceedings in a court of law, without negligence on the part of the adverse party, and which must necessarily make that court an instrument of injustice, unless the advantage thus gained is restrained: *Dunlap v. Steere*, 92 Cal. 344; 27 Am. St. Rep. 143, and note; *Merriman v. Walton*, 105 Cal. 403; 45 Am. St. Rep. 50. But before relief will be granted in equity against a judgment at law, it must appear that there was a good defense to the action, which the defendant was prevented from making by fraud, accident, mistake, or surprise, unmixed with laches or negligence on his part: *Nye v. Sochor*, 92 Wis. 40; 53 Am. St. Rep. 896, and note.

NOTICE—REGISTRATION OF INSTRUMENTS.—The record of duly executed mortgages or conveyances, not absolutely void, is constructive notice to purchasers and subsequent encumbrancers: *Roby v. Bismarck Nat. Bank*, 4 N. Dak. 156; 50 Am. St. Rep. 633, and note. One who takes a mortgage upon real property has constructive notice of every fact which could have been ascertained by an inspection of the deeds and mortgages on record in the chain of title: *Kirsch v. Tozier*, 143 N. Y. 390; 42 Am. St. Rep. 729; *Backer v. Pyne*, 130 Ind. 288; 30 Am. St. Rep. 231, and note.

SPRECKELS v. SPRECKELS.

[116 CALIFORNIA, 339.]

HUSBAND AND WIFE—COMMUNITY PROPERTY, NATURE OF HUSBAND'S INTEREST IN.—Under a statute providing that a husband has the management and control of the community property, with the like power of disposition, other than testamentary, as he has of his separate estate, he is the owner of such property, and the interest of his wife therein is a mere expectancy.

HUSBAND AND WIFE—COMMUNITY PROPERTY, STATUTE ATTEMPTING TO DEPRIVE HUSBAND OF POWER TO MAKE GIFTS.—If community property is acquired under a statute giving the husband the same power over it, other than testamentary, as of his separate estate, an amendment of such statute providing that he cannot make a gift of such property or convey it without consideration unless his wife in writing consents thereto, cannot be applied to community property acquired prior to its enactment.

DEMURRER—MISJOINDER OF HUSBAND AND WIFE.—A complaint in an action to recover community property to which both husband and wife are parties plaintiff is subject to a demurrer, for misjoinder, although the statute forbids his making a gift of the community property without her consent, and the action is to recover such property alleged to have been so given away by him.

Delmas & Shortridge, for the appellants.

Rothchild & Ach, for the respondent.

340 **TEMPLE, J.** This is an appeal from a judgment entered upon demurrer to the complaint, and from an order dissolving an injunction. The plaintiffs are husband and wife, and sue to recover certain corporate stock. It is averred in the complaint that the plaintiffs intermarried July 11, 1852, and that on the thirty-first day of July, 1893, they owned the corporate stock, as community property, which on that day the plaintiff, Claus Spreckels, voluntarily, and without any consideration and without the consent of his wife, the other plaintiff, transferred as a gift to the defendant. The said Anna C. Spreckels has never consented in writing or otherwise to said transfer or gift. The complaint contains many other allegations, which, however, are not material to this discussion.

The complaint was demurred to on various grounds, and, among them, that the complaint does not state sufficient facts to constitute a cause of action, and there is a misjoinder of parties plaintiff, in that the wife is joined with her husband as plaintiff in an action to recover community property.

The first point made by the demurrer rests upon the assumption that the complaint shows that the stock became the community property of the plaintiffs prior to the passage of the

amendment to section 172 of the Civil Code, which was made March 31, 1891. The complaint does not state when the stock was acquired, and, as this is a material question, it is contended that plaintiffs must be deemed to have stated their case as favorably to themselves as the facts would warrant, and, therefore, it must be held that the stock was acquired prior to that date. As appellant's counsel seem to acquiesce in this claim, I shall so consider it.

Prior to the amendment the section read as follows: ³⁴¹ "The husband has the management and control of community property, with the like power of disposition (other than testamentary) as he has of his separate estate." The amendment consisted in adding the following: "Provided, however, that he cannot make a gift of such community property, or convey the same without a valuable consideration, unless the wife, in writing, consent thereto."

Respondent contends that the amendment cannot be held to apply to community property acquired prior to the amendment, nor to marriages entered into prior to that time. So construed, he contends it would deprive the husband of a vested proprietary right in the community property, to wit, the power to dispose thereof without the consent of his wife, and without a valuable consideration, and that it also impairs the obligation of a contract.

It is said that the law was, at the time of the marriage, that the husband had the management and control of the community property, with the like absolute power of disposition, other than testamentary, as of his separate estate, and that this became a part of the contract by which the marriage was constituted, and to deprive the husband of this power is to impair the obligation of that contract.

To determine whether the amendment, if applicable to community property acquired prior to its passage, would deprive the husband of a vested right of property, it is necessary to consider what were the rights of husband and wife in the community property at the date of its passage.

The constitution does not mention community property, but does define what shall constitute the separate property of the spouses: Const., art. 20, sec. 8.

The Civil Code, section 161, provides that the husband and wife may hold property as joint tenants, tenants in common, or as community property. Then, having defined separate prop-

erty, it provides that all other property acquired after marriage by either husband ³⁴² or wife, or both, is community property. Section 167 enacts that the community property is not liable for the debts of the wife contracted after marriage; section 168, that the earnings of the wife are not liable for the debts of the husband; and section 169, that the earnings and accumulations of the wife and of her minor children, who are in her custody, while she is living apart from her husband, are her separate property. Section 172 is the section now under consideration.

Section 682 of this code is: "The ownership of property by several persons is either: 1. Of joint interests; 2. Of partnership interests; 3. Of interests in common; 4. Of community interest of husband and wife." Section 687 again defines community property.

This court has held, after mature consideration, that upon the death of the husband the wife takes one-half of the community property as heir.

It has been held that the husband can make a gift of the community property to the wife, and convert it into her separate estate. To this it may be added that the wife, if possessed of business capacity, can obtain permission to carry on business in her own name as a sole trader, and that the profits of such business are her separate property.

Prior to the amendments of 1891 the code vested in the husband, with reference to the community property, all the elements of ownership, and in the wife none. If the rights of the parties in the community property are the same, then the law is partial to the wife. She can easily manage that all her earnings and accumulations shall be her separate property. The husband can in no way obtain a similar advantage. If the wife is living separate and apart from the husband, through her own fault, her earnings and accumulations are her own. Yet, if the husband during the same time accumulates a fortune, it is community property. There is no mode in which community property can be converted into his separate property.

As to all the world except the wife, there was, prior ³⁴³ to this amendment, no distinction between the community estate and the separate estate of the husband. If suit were brought upon a liability incurred in a business, the profits of which would be community property, and judgment recovered, execution could be levied upon the separate estate of the husband, and the debt entirely satisfied therefrom. His separate estate, during the entire

marriage, is liable to be taken for community debts, and, of course, furnishes a credit in aid of community business. If the community loses, the loss may fall upon his separate estate, but his separate estate cannot profit by the success of the community.

The separate property of the wife is exempt from all these liabilities, but, on the other hand, the community property is liable for debts incurred by the husband in the management of his separate estate.

Now all these differences point to the fact that the husband is the absolute owner of the community property. Therefore it is that his liabilities incurred in the management of the separate estate can be enforced against the common property, while those of the wife cannot be. And, therefore, she, under certain circumstances, can accumulate property which shall not belong to the community. If it went to the community, it would belong to the husband, and under the circumstances it is not thought just that he should have it. He needs no corresponding privilege, because the community property is his as absolutely as is his separate estate. So he cannot convert it into his separate estate, and if the property belonged to the community, and the husband had only an agency, perhaps he could not give it to his wife.

Now, then, we have this state of the case: The statute provides that the husband and wife may hold property as community property: Civ. Code, sec. 161. It defines what shall constitute community property. It defines ownership (Civ. Code, sec. 654), and then gives to the husband complete legal ownership of the community ³⁴⁴ property (Civ. Code, sec. 172), and confers upon the wife no element of ownership whatever.

Courts and counsel have occasionally endeavored to find some property right in the wife, or some respect in which the husband's interest falls short of full property. I think it will be universally admitted that so far there has been a complete failure in this respect. The first attempt shown by our reports of that kind is in *Godey v. Godey*, 39 Cal. 157. In that case it is said that while no other technical term so well defines the wife's interest as the phrase "a mere expectancy . . . it is at the same time, . . . so vested in her that [the] husband cannot deprive her of it by his will, nor voluntarily alienate it for the mere purpose of divesting her of her claim to it."

The testamentary power is not an essential incident to property, and depriving the husband of such power with reference to the community estate did not take from him any right of prop-

erty. It was competent for the legislature to deny to the husband the right to dispose of his separate estate by will, and to provide that upon his death all should go to his widow subject to the payment of his debts. Should the legislature now so provide, it would not deprive the husband of any vested right to property, or give the wife an interest in his estate during his life. If the property did not belong to the husband, there would be no occasion for a law limiting his testamentary power with reference thereto. The original statute, which practically adopted the Mexican system as to gananciales, was held to constitute such a limitation: *Beard v. Knox*, 5 Cal. 256; 63 Am. Dec. 125. That gave the wife a nominal estate during the marriage which became an actual estate upon its termination.

If the husband cannot make a valid transfer of the property for the purpose of depriving the wife of it, that does not show a vested right in her. This is explained in the very case quoted as authority, in *Godey v. Godey*, 39 Cal. 157. ³⁴⁵ In *Smith v. Smith*, 12 Cal. 217, 73 Am. Dec. 533, Justice Field said: "Voluntary conveyances, given on the eve of marriage for the purpose of depriving the intended wife of her right of dower, where that common-law right exists, are fraudulent as against her claim. This was so adjudged in *Swaine v. Perine*, 5 Johns. Ch. 482, 9 Am. Dec. 318; and upon the same principle, a voluntary disposition by the husband of the common property, or a portion thereof, for the like purpose of depriving the wife of her interest in the same, must be held ineffectual against the assertion of her claim." Nor can he put his separate property out of his hands for the purpose of defeating his wife in an anticipated application for alimony: *Murray v. Murray*, 115 Cal. 266; 56 Am. St. Rep. 97. So we see a mere expectancy, without any vested property right at the time the fraud was committed, is sufficient to enable the person who has the expectancy to maintain the action after his right has become vested.

The husband's ownership of one-half of the community estate is in a sense conditional. It may terminate upon the happening of a possible event. Until then he is, however, absolute owner as defined in the code: Civ. Code, secs. 678-680.

The marital community was not organized for the purpose of accumulating property, and the husband owes no duty to the community, or to the wife either, to labor or accumulate money, or to save or practice economy to that end. He owes his wife and children suitable maintenance, and if he has sufficient income

from his separate estate for that purpose he need not engage in business, or so live that there can be community property. If he earns more than is sufficient for such maintenance, he violates no legal obligation if he spends the surplus in extravagance or gives it away. The community property may be lost in visionary schemes or in mere whims. Within the law he may live his life, although the community estate is dissipated. Of course, I am not now speaking of his moral obligations.

²⁴⁸ We derived the system of community estate from the Mexican law which prevailed here before the acquisition of the territory. The system was unknown to the common law, and it has no better name for the interest of the wife during the marriage than "a mere expectancy." The Mexican jurists spoke of it as a feigned and fictitious ownership or as merely nominal, and it is contrasted with the ownership of the husband. That is called the actual or true ownership. In *Panaud v. Jones*, 1 Cal. 488, it is said: "The wife, says Febrero (Febrero Mejicano, sec. 19, p. 225), is clothed with the revocable and feigned dominion and possession of one-half of the property acquired by her husband during the marriage; but, after his death, it is transferred to her effectively and irrevocably. . . . The husband needs not the dissolution of the marriage to constitute him the real and veritable owner of all the gananciales, since even during the marriage he has in effect the irrevocable dominion," etc.

In *Van Maren v. Johnson*, 15 Cal. 308, it is said that the estate of the common property is in the husband, and he may dispose of it as he can of his separate estate—the interest of the wife being a mere expectancy. *Guice v. Lawrence*, 2 La. Ann. 226, is cited as authority. In *Packard v. Arellanes*, 17 Cal. 525, that case is again cited as authority, in which it is said that during the life of the husband the wife cannot say she has gananciales—that is, community property—but the husband during marriage is "real y verdadero dueño de todos, y tiene en el efecto su dominio irrevocable." Where, too, the interest of the wife was said to be revocable and fictitious.

In *Escriche*, under *Bienes Gananciales*, it is said that the husband owns the community property, both nominally and in fact—en habito y en acto, while the wife's ownership is only nominal—en habito—becoming an actual estate upon the dissolution of the marriage.

In *Ballinger on Community Property*, section 35, the Mexican law is stated as above, the wife had only a feigned or fictitious es-

tate which ripened into a legal ³⁴⁷ estate upon the termination of the marriage, and he adds—referring to the state of things under the former statute of this state which provided that upon the death of the wife prior to the death of the husband one-half of the community property should go to her heirs—that since the statute failed to provide that upon the death of the wife one-half should go to her estate, her intangible interest did not ripen into a legal estate. Accordingly, it was held in *Packard v. Arclanes*, 17 Cal. 525, that under such circumstances the interest of the wife could not be administered upon, and that her heirs did not acquire the estate by inheritance from her upon her death before her husband, but took as persons designated by the statute. Speaking of the wife's interest, it is there said: "Such interest constitutes neither a legal nor an equitable estate, and there is, therefore, nothing in it for a court of probate to act upon. If, under the statute, the title of the husband, upon the death of the wife, is divested as to any portion of the property, such title passes directly to the descendants of the wife, and they take it subject to the liability of the property to be absorbed in the payment of debts."

As the law stood prior to the amendment of 1891, I doubt if a happier phrase could have been devised to express the interest of the wife in the community than that used by Judge Field in *Van Maren v. Johnson*, 15 Cal. 308, "a mere expectancy." It may be said to be a right—not to property, but, as against the community—to take one-half of the residue after payment of debts in case the marriage be dissolved during her life. A somewhat similar state of things exists in France under the code, and it has been there said that the wife is not "*proprie socia, sed speratur fore*. She has une simple esperance to share in such property as may be found at the dissolution of the community undisposed of by the husband": 1 *Burges' Colonial Law*, 368.

The system of the community in California, Louisiana, and Texas was inherited from Spain or Mexico, and simply continued with such changes as were deemed ³⁴⁸ desirable. It was adopted in Washington, Nevada, Idaho, and Arizona. The systems are not exactly alike. In some states—Texas, Louisiana, and Idaho—profits, increase, and income of separate property also become community property. It is not so here. If the wife has separate property, the increase derived from it is also separate property; only the earnings and the profits gained in business and the increase of property so acquired is community

property; and, as we have seen, the wife may so manage as to convert all gains derived from business transacted by her into her separate property.

In Washington, the husband cannot convey real estate belonging to the community without joining the wife; there the husband and wife may at any time agree as to the status of the community property, such agreement to take effect at the death of either, and either may give, grant, or sell to the other his or her interest in community property. Naturally, in that state it has been held that the wife has a vested interest in the community property: Ballinger on Community Property, sec. 78. In no other state, so far as I am aware, has there been any such holding, although in Texas it has been said that she has an equitable interest.

It is suggested that the sole ownership of the community property—if it be conceded to the husband—is vested in him by statute, and may be taken from him by statute. All ownership has been said to be the offspring of law, but it does not therefore follow that all property rights can be divested by law. In fact, I see no connection between the premise and the conclusion. Whether the law of the marriage relation can be changed so as to affect the status of property acquired thereafter is another question.

The community property, as a rule, constitutes the earnings, gains, and savings of a man during his whole lifetime. If he can make presents to his friends, provide for indigent relatives, or make advancements to his children, it must be from this property. To deprive ²⁴⁹him of this power is certainly to divest him of a property right.

This argument need not, however, be pursued further, because counsel admit that if the husband is the owner of the property, then a statute which makes the exercise of the right to dispose of it subject to the will of another is unconstitutional.

Entertaining these views, it is unnecessary to consider the other contention under this head, that the amendment violates the obligations of a contract. It is clear, I think, that the operation of the amendment must be confined, at least, to community property acquired after its passage.

I think the ruling sustaining the demurrer to the complaint, on the ground that there is a misjoinder, in that the wife cannot be joined as plaintiff in an action to recover community property, must also be sustained—and that without reference to

the question as to the nature of the wife's interest in the community property. If the gift was void, the property still remained community property and was as much under the management and control of the husband as any other portion of the community property. To hold that the wife is a necessary or proper party in this case would be to hold that she is such in every case brought to recover community property. The statute, as amended, does not give her a right of action in this case, but leaves it to the general rule. It has been held for near half a century that she is not a proper party to such actions.

The judgment and order are affirmed.

Henshaw, J., Harrison, J., and McFarland, J., concurred.

BEATTY, C. J., concurring. I concur in the judgment, but upon a ground somewhat narrower than that taken in the opinion of Justice Temple. It does not seem to me necessary, in order to sustain the ruling of the superior court upon this demurrer, to go to the extent of ³⁵⁰ holding the proviso added to section 172 of the Civil Code by the act of 1891 an unconstitutional attempt to take away from the husband his vested rights in community property acquired prior to that date. I am not at all clear that it does impair any vested right. But, allowing the law to be constitutional as to all community property, irrespective of the date of its acquisition, or of the marriage by which the community was formed, it still does not go far enough to sustain this action.

If the husband makes a gift or voluntary transfer of community property, the transfer is good against him. He has no right of action to recover it back. The only person who in any case has a right to complain is the wife, and she cannot maintain an action to revoke the gift until she has been injured by it. Upon the dissolution of the community by the death of the husband, or by divorce, I think that in estimating her share of the community property she would be entitled to have any property given away by the husband subsequent to the act of 1891 reckoned as a part of the community assets, and that she would be entitled to reclaim from the donee enough to make up her half of the whole, if less than one-half remained undisposed of. In all ordinary cases this would be the proper and sufficient remedy for any infringement of her rights. It is possible that a case might arise in which the circumstances would warrant the institution of an action by her before the dissolu-

tion of the community, but no such circumstances are shown to exist in this case. It does not appear that the amount of the gift was so disproportionate to the amount of the community property as to endanger the right of the wife to her full share on the dissolution of the community, or to deprive the husband of the means of supporting the wife and others dependent upon him. In short, it does not show any present or prospective injury to her, and he, of course, has no ground of complaint. If the wife survives her husband, she will get her full share of the community ³⁵¹ property out of that which remains. If the husband survives the wife, he will get everything that he has not voluntarily parted with.

On this ground I place my concurrence in the judgment.

Rehearing denied.

HUSBAND AND WIFE—COMMUNITY PROPERTY—NATURE OF HUSBAND'S INTEREST.—The husband and wife during coverture are jointly seised of community property in California, the wife's half interest being subject only to the husband's disposal during their joint lives: *Beard v. Knox*, 5 Cal. 252; 63 Am. Dec. 125. The husband has a right, during the wife's lifetime, to sell their community property, the homestead of the family excepted, and he may do this without the wife's consent: *Brewer v. Wall*, 23 Tex. 585; 76 Am. Dec. 76; *Meyer v. Kinzer*, 12 Cal. 247; 73 Am. Dec. 538. See also, *Smith v. Smith*, 12 Cal. 216; 73 Am. Dec. 533; *Packwood's Succession*, 9 Rob. (La.) 438; 41 Am. Dec. 341. The wife's interest in community property is a mere expectancy: *People v. Swalm*, 80 Cal. 46; 13 Am. St. Rep. 96.

PLEADING—DEMURRER—MISJOINDER OF PARTIES—HUSBAND AND WIFE.—A complaint in which the names of husband and wife appear in the caption as plaintiffs, but the body of which states a cause of action in her favor alone, and does not mention him, may be regarded as good upon demurrer, by treating the mentioning of him in the caption as a mere surplusage: *Missisnewa Min. Co. v. Patton*, 129 Ind. 472; 28 Am. St. Rep. 203. Objection to improper joinder of parties must be taken by demurrer or it is deemed waived under the Missouri statute: *Bensieck v. Cook*, 110 Mo. 173; 83 Am. St. Rep. 422, and note; *Alvarez v. Brannan*, 7 Cal. 503; 68 Am. Dec. 274, and note.

MILLER v. CARR.

[116 CALIFORNIA, 378.]

JUDGMENT BY DEFAULT, VACATING FOR MISTAKE.—

If a defendant against whom a judgment has been entered by default moves to set it aside, and, in support of his motion, files an affidavit of merits and also an affidavit stating that immediately after the service of the summons on him, he indorsed the words thereon "Served June 25, 1895," and that to the best of his knowledge and belief, such service was made on the 25th and not on the 24th of that month, that if such service was made on the 24th, he was then, and has ever since been mistaken as to the date, that he informed his counsel that it was served on the 25th, and that, because of such mistake, a demurrer was not served until one day too late, such motion should be granted, and the order refusing to grant it is erroneous.

JUDGMENT, VACATING—EXCUSABLE MISTAKE, WHAT IS.— A mistake in good faith as to the date on which summons was served, resulting in the defendant not appearing within the time allowed by law, is such a mistake as requires relief to be granted under a statute authorizing relief from a judgment taken against a defendant through his mistake, surprise, or excusable neglect.

JUDGMENT, VACATING—DISCRETION OF THE COURT.— Though the trial courts have a discretion in acting upon motions for relief from judgments because of mistake and excusable neglect, this discretion ought to be so exercised as to tend, in a reasonable degree, to bring about a judgment on the merits, and where the circumstances are such as to lead a court to hesitate upon a motion to open a default, it is better, as a general rule, to resolve the doubt in favor of the application. In a plain case, the appellate court will reverse an order refusing to open a default.

Edward J. McCutchen, for the appellant.

J. W. Mahon and R. Z. Ashe, for the respondent.

379 HAYNES, C. This appeal is from a judgment by default, and from an order denying defendant's motion to vacate said judgment and default.

The action was commenced in the superior court of Kern county, June 20, 1895, and the summons was ³⁸⁰ served upon the defendant at the city and county of San Francisco by the sheriff thereof on the twenty-fourth day of the same month, as shown by the return of said sheriff indorsed thereon. On July 25th, the thirty-first day after said service as shown by said return, defendant's default and judgment thereon were entered by the clerk.

Defendant promptly moved to set aside the judgment and default upon the ground that they were taken against him through his mistake in the date upon which service of the summons was made upon him, and in support of said motion two affidavits, one made by the defendant and one by his attorney, were read, and

in opposition thereto plaintiff read the said return of said sheriff. No other evidence was offered or heard.

Defendant's affidavit shows that immediately after the service of the summons upon him he noted thereon the words "served June 25, 1895"; that to the best of his knowledge and belief said summons was served upon the 25th and not on the 24th; that if the service was made on the 24th he was then and ever since has been, mistaken as to the date of service; that he informed his counsel that it was served on the 25th; that if he was mistaken in the date his demurrer was filed and served one day too late. Said affidavit also contained a sufficient affidavit of merits.

The affidavit of his attorney, Mr. McCutchen, shows that the papers served upon defendant were handed to him a few days after the service; that he was then informed by defendant that the service was made on the 25th, and noticed defendant's memorandum thereof at that time; that defendant informed him of the facts of the case, and instructed him to move for a change of the place of trial, and noted in his journal that July 25, 1895, was the last day to plead; that he prepared a demurrer and the motion papers, and mailed them to Bakersfield, where, as appears by defendant's affidavit, they were served and filed on the 25th of July.

We think the court erred in not granting defendant's ³⁵¹ motion. It is true the clerk was required to act upon the sheriff's return, but, upon the hearing of this motion, the court, upon its clearly appearing that the sheriff was in error as to the date, could have ordered the return to be amended in that particular, and in such case the default and judgment would have been set aside.

That, however, was not clearly shown, and the motion was therefore based upon the mistake of the defendant. It was not questioned that the defendant in good faith believed that the service was made on the 25th instead of the 24th, and that he therefore believed that his appearance was in time. It was such a mistake as is clearly within the provisions of section 473 of the Code of Civil Procedure, which permits the court to grant relief, and which the spirit of the code requires to be granted. Relief in such cases is said to be within the discretion of the court; but "the exercise of the mere discretion of the court ought to tend, in a reasonable degree at least, to bring about a judgment on the very merits of the case, and, where the circumstances are such as to lead the court to hesitate upon the motion to open the default,

it is better, as a general rule, that the doubt should be resolved in favor of the application": *Watson v. San Francisco etc. R. R. Co.*, 41 Cal. 17; *Grady v. Donahoo*, 108 Cal. 211. "The code establishes the law of this state respecting the subjects to which it relates, and its provisions and all proceedings under it are to be liberally construed, with a view to effect its objects and to promote justice": *Code Civ. Proc.*, sec. 4. In *Bailey v. Taaffe*, 29 Cal. 424, cited by respondent to the effect that such orders "rest very much in the discretion of the court below, and will not be disturbed by this court unless we are satisfied that the order is so plainly erroneous as to amount to an abuse of discretion," the court also said: "It is not a mental discretion to be exercised ex-gratia, but a legal discretion to be exercised in conformity with the spirit of the law, and in a manner to subserve, and not to impede or defeat, the ends of substantial justice. In a plain case this discretion ³⁸² has no office to perform, and its exercise is limited to doubtful cases where an impartial mind hesitates."

The order refusing to set aside the judgment and default should be reversed.

Searls, C., and Belcher, C. J., concurred.

For the reasons given in the foregoing opinion, the order refusing to set aside the judgment and default is reversed.

Harrison, J., Garoutte, J., Van Fleet, J.

JUDGMENTS BY DEFAULT—WHEN MAY BE VACATED FOR MISTAKE OR NEGLIGENCE.—It is proper to open a default against a defendant, upon the ground of his excusable negligence, where his attorney was informed by the clerk that no business would be transacted by the court until after a certain date, and, relying upon this statement, he did not appear until such date, when he found that his pending demurrer had been overruled: *Anaconda Min. Co. v. Salle*, 16 Mont. 8; 50 Am. St. Rep. 472, and note. See extended note to *Payton v. McQuown*, 53 Am. St. Rep. 444-453, on negligence as a bar in equity to relief against judgment: Also, see, *Baxter v. Chute*, 50 Minn. 164; 86 Am. St. Rep. 633, and note.

JUDGMENTS—VACATING—DISCRETION OF COURT.—The granting of applications for relief from judgments by default is entirely within the discretion of the court to which application is made: *Griswold Linseed Oil Co. v. Lee*, 1 S. Dak. 531; 86 Am. St. Rep. 761; *Clemmons v. Field*, 99 N. O. 400; 6 Am. St. Rep. 529.

PEOPLE v. TRUCKEE LUMBER COMPANY.

[116 CALIFORNIA, 197.]

NUISANCE RENDERING WATERS OF A STREAM POISONOUS TO FISH THEREIN.—To place in the waters of a stream refuse material from a mill, consisting of sawdust, shavings, and other like substances, which are poisonous to fish, is to create a public nuisance.

FISH WITHIN THE WATERS OF A STATE constitute the most important part of that species of property commonly designated as "wild game," and the original right and ownership of which is in the people of the state. The right to protect such property for the common use and benefit is one of the recognized prerogatives of the sovereign.

FISH IN NON-NAVIGABLE WATERS.—THE RIGHT OF A STATE TO PROTECT FISH is not confined to navigable or public waters. It extends to all waters within the state, public or private, where these animals are accustomed to resort for spawning or other purposes, and of which they have freedom of passage to and from the public fishing grounds of the state.

JUDICIAL NOTICE.—The court will take judicial notice that the Truckee river has its source in Lake Tahoe, a large navigable body of water, lying partly in this state, that it flows thence into the state of Nevada, and empties into Pyramid lake, also navigable, and that between these two bodies of water the river affords a natural and free highway for the passage of fish.

FISH, RIPARIAN PROPRIETOR'S RIGHTS RESPECTING. Though a stream is not navigable, and the lands through which it flows have vested in private ownership, the riparian proprietors do not own the fish therein. Their right of property attaches only to those reduced to actual possession, and they have no right to kill or obstruct the free passage of those not taken.

NUISANCE MAY ALSO BE A MISDEMEANOR.—The fact that acts are by the Penal Code made misdemeanors and punishable as such does not make them less a nuisance, nor imply that the legislature intended to make the criminal remedy exclusive of the civil.

NUISANCE, PUBLIC.—An information may be brought by the attorney-general without the information of a private relator to obtain an injunction against the continuance of a public nuisance consisting of the depositing in a non-navigable stream of substances poisonous to the fish thereof.

Thomas S. Ford, and C. F. McGlashan, for the appellant.

Attorney General W. F. Fitzgerald and Deputy Attorney General Henry E. Carter, for the respondent.

288 **VAN FLEET, J.** Appeal from an order refusing to vacate an injunction.

The action is in the name of the people, on the information of the attorney general, to restrain the commission of an alleged nuisance, the complaint alleging in substance that defendant, a corporation, maintains and operates a sawmill and box factory on the bank of the Truckee river, at the town of Truckee, in this state, in which it cuts and manufactures lumber and boxes; that

said river is a fresh-water stream, having its source in the state of California and flowing into the state of Nevada, and is now, and for a long time prior hereto has been, stocked with fish; that defendant in operating its mill and factory has heretofore, and does now, place and allow to pass into the waters of said river large quantities of refuse matter, consisting of sawdust, shavings, ³⁹⁹ slabs, edgings, waste, and other deleterious substances, the effect of which has been and is to pollute said stream and the waters thereof, and render the same unfit for use, and which substances are poisonous and deleterious to the fish in said stream, and are killing, destroying, and exterminating them; all of which is alleged to be in violation of the rights of the people, and a public nuisance; that defendant threatens, and unless restrained will continue, to commit said wrongful acts to plaintiff's irreparable injury.

A preliminary injunction was granted ex parte on the filing of the complaint, which defendant subsequently moved to vacate. The motion was made upon the complaint alone, based upon the objection that the facts alleged made no case for relief. The motion being denied, this appeal ensued.

The sole question is, whether the complaint states a cause of action, and this is to be determined precisely as if the pleading were subjected to a general demurrer.

The first point made against the complaint is, that the facts alleged do not constitute a public nuisance within the definition of our code. But this objection would seem to overlook the most material feature of the complaint. It is alleged that the acts of defendant have the effect of polluting and poisoning the waters of the river, and thereby killing and destroying the fish therein. Anything which is "an obstruction to the free use of property so as to interfere with the comfortable enjoyment of life or property by an entire community or neighborhood, or any considerable number of persons," is a public nuisance: Pen. Code, sec. 370; Civ. Code, secs. 3479, 3480. The fish within our waters constitute the most important constituent of that species of property commonly designated as wild game, the general right and ownership of which is in the people of the state (*Ex parte Maier*, 103 Cal. 476, 483; 42 Am. St. Rep. 129), as in England it was in the king; and the right and power to protect and preserve such property for the common use and benefit is one of ⁴⁰⁰ the recognized prerogatives of the sovereign, coming to us from the common law, and preserved and expressly provided for by the stat-

utes of this and every other state of the Union. The complaint shows that by the repeated and continuing acts of defendant this public property right is being and will continue to be greatly interfered with and impaired; and that such acts constitute a nuisance, both under our statute and at common law, is not open to serious question: *People v. Elk River etc. Co.*, 107 Cal. 219; 48 Am. St. Rep. 121.

But defendant urges that the facts do not show the infringement of any public right, in that the right, if any, shown to be interfered with is solely that of fishery, or the privilege to take fish; that this is a public right only so far as it pertains to navigable waters, while as to all other waters it is exclusively in the riparian proprietor; that, as the Truckee river is not a navigable stream, the destruction of the fish therein is not an injury to the public for which the people can complain, there being no allegation that the riparian proprietors thereon have been injured.

In the first place, the common right to take fish extends not alone to navigable waters, but exists as to all waters, the lands underlying which are not in private ownership—in other words, to all lakes, ponds, or streams, navigable or otherwise, upon the public lands of this state or the United States not protected by reservation; and since there is no averment that the lands along the Truckee river are held in private proprietorship, we think the presumption must be that the title remains in the government.

But, in the next place, if this is not the presumption, the case would not be different. The dominion of the state for the purposes of protecting its sovereign rights in the fish within its waters, and their preservation for the common enjoyment of its citizens, is not confined within the narrow limits suggested by defendant's argument. It is not restricted to their protection only ⁴⁰¹ when found within what may in strictness be held to be navigable or otherwise public waters. It extends to all waters within the state, public or private, wherein these animals are habited or accustomed to resort for spawning or other purposes, and through which they have freedom of passage to and from the public fishing grounds of the state. To the extent that waters are the common passageway for fish, although flowing over lands entirely subject to private ownership, they are deemed for such purposes public waters, and subject to all laws of the state regulating the right of fishery: *Cottrill v. Myrick*, 12 Me. 222; *State v. Franklin Falls Co.*, 49 N. H. 240; 6 Am. Rep. 513; *State v. Roberts*, 59 N. H. 256; 47 Am. Rep. 199; 59 N. H. 484.

For the purposes of the right involved in this action, then, the Truckee river, so far as it flows within this state, is a part of the waters to which the jurisdiction of the state in the protection of its fish supply extends. This court will take judicial cognizance of the fact that the river has its source in Lake Tahoe, a large navigable body of water lying partly in this state, and that it flows thence into the state of Nevada, and empties into Pyramid Lake, also navigable; and the court may also take notice of a fact so common and notorious that between these two bodies of water the river affords, and has from time immemorial, a natural and free highway for the passage of the fish inhabiting these lakes. Even, therefore, if, as contended by defendant, the lands through which the stream flows are to be presumed, in the absence of contrary averment, to be owned in private proprietorship, it can make no difference as to the right here asserted. While the right of fishery upon his own land is exclusively in the riparian proprietor, this does not imply or carry the right to destroy what he does not take. He does not own the fish in the stream. His right of property attaches only to those he reduces to actual possession, and he cannot lawfully kill or obstruct the free passage of those not taken. "This right in the owner of the land must be ⁴⁰² regarded as qualified to a certain extent by the universal principle that all property is held subject to those general regulations which are necessary to the common good and general welfare, and to that extent it is subject to legislative control. It is a well-established principle that every person shall so use and enjoy his own property, however absolute and unqualified his title, that his use of it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the public. Hence, while the riparian owner has the exclusive right of fishery upon his own land, he must so exercise that right as not to injure others in the enjoyment of a similar right upon their lands upon the stream above and below": *State v. Roberts*, 59 N. H. 256; 47 Am. Rep. 199.

The mere fact, then, that the interference or obstruction complained of may, in fact, be in a stream where the right of fishery is exclusively in private riparian owners, does not make the acts here complained of any less an invasion of the public right, nor prevent the state from protecting its general interest in the property.

The fact that acts of the character alleged are by the Penal Code made a misdemeanor, and punishable as such, does not

make them less a nuisance, nor imply that the legislature intended to make the criminal remedy exclusive of the civil.

Nor is there anything in the objection that the attorney general is not privileged to maintain the action upon his own information, without the intervention of a private relator: *People v. Davidson*, 30 Cal. 388; *People v. Stratton*, 25 Cal. 242; *People v. Gold Run etc. Co.*, 66 Cal. 138; 56 Am. Rep. 80.

The other objections made do not call for particular notice.

Order affirmed.

Harrison, J., and Beatty, C. J., concurred.

FISHERIES—RIGHT OF STATE TO CONTROL—NON-NAVIGABLE WATERS—RIGHTS OF RIPARIAN OWNERS.—The state, representing the people, may regulate common rights and privileges of fishing, and an act of the legislature intended to protect and further such rights is valid: *Moulton v. Libbey*, 37 Me. 472; 50 Am. Dec. 57; and the inclination of the courts is to sustain such legislation: Extended note to *Ex parte Maier*, 42 Am. St. Rep. 138. The right to fish in an unnavigable stream is in the owner of the soil, to the exclusion of the public: *Waters v. Lilley*, 4 Pick. 145; 16 Am. Dec. 333; *Beckman v. Kreamer*, 43 Ill. 447; 92 Am. Dec. 146. But this right does not carry with it the right to prevent the passage of fish to the lakes and ponds for increase of the species: *Commonwealth v. Chapin*, 5 Pick. 199; 16 Am. Dec. 386. See, also, *State v. Roberts*, 50 N. H. 256; 47 Am. Rep. 199.

FISHERIES—RIGHT OF PROPERTY IN FISH.—To a complete right of property in fish, an actual appropriation or mancipation must be made. The possession must be complete, and if, when taken, they are voluntarily restored to their native element, so that they can only be regained in like manner to that in which they were originally taken, the right of property is lost: *Sollers v. Sollers*, 77 Md. 148; 39 Am. St. Rep. 404, and note.

NUISANCE—MAY ALSO BE MISDEMEANOR. When a statute has declared that certain acts constitute a nuisance, and that any person intentionally doing them shall be guilty of a misdemeanor, the common law, if an individual is injured, will supply a civil remedy though the statute gives none: *Columbus etc. Coal etc. Co. v. Tucker*, 48 Ohio St. 41; 29 Am. St. Rep. 528; *State v. Wilkinson*, 3 Vt. 480; 21 Am. Dec. 500.

GRANT v. MURPHY.

[116 CALIFORNIA, 427.]

PARTITION.—DUTY OF THE COURT TO DETERMINE THE INTERESTS OF THE PARTIES.—As a general rule all the parties to a suit in partition are actors, each having the right to set up in his pleadings the nature and extent of his interest, and to have the same ascertained and adjudicated by the interlocutory decree. This rule applies where the property must be sold for partition as well as in other cases, and a decree which does not adjudicate the interests of the respective parties is ordinarily erroneous.

PARTITION PENDING PROBATE PROCEEDINGS.—If one of several cotenants dies, the others remain entitled to the partition of the property, and are not obliged to refrain from prosecuting proceedings therefor until the estate of the decedent cotenant has been settled in a court of probate and his share of the property distributed by it to the persons found entitled thereto. At least, this is the law where the property is such that partition of it must be accomplished by its sale.

PARTITION—CONFLICT OF JURISDICTION WITH THE PROBATE COURT, HOW MAY BE AVOIDED.—If a cotenant dies, and a suit is subsequently commenced by another cotenant for the partition of the property by a sale thereof, and the question of who are the heirs or devisees of the decedent has not been determined by the court of probate, which alone has jurisdiction of such question, the court may proceed to make partition by determining what is the interest of the decedent, and finding that such interest belongs to those who are entitled to the real estate of which he died seised, leaving the probate court to determine who are such persons and what are their respective interests.

George D. Metcalf, Metcalf & Metcalf, Myrick & Deering, and A. A. Moore, for the appellants.

Lloyd & Wood, for the respondent.

428 **McFARLAND, J.** This is an appeal from an interlocutory decree in a suit for partition. The point made by the appellants is, that the decree does not determine the interest of all the various parties in the premises, and that for this reason it is invalid and should be reversed.

The facts found by the court, and admitted by the parties, which are necessary to be noticed, are these: The premises consist of a city lot in San Francisco, upon which there is a large business building; and it is found by the court, and admitted, that it cannot be divided, but must be sold. On the third day of June, 1885, the owners of the premises were Adam Grant and Daniel T. Murphy, each owning an undivided half as tenant in common with the other. On that day the said Daniel T. Murphy died, leaving a will; and afterward his half of the property was distributed by the proper probate court, as follows: One-half

thereof, or six twenty-fourths of the whole property, to his widow, Anna L. Murphy, and one twenty-fourth to each of his six children, Eugene K. L. Murphy, Daniel T. Murphy, Samuel J. Murphy, Mary Helen Murphy (now Mary Helen Dominguez), Frances Josephine Murphy, and Mary Margaret Isabella ⁴²⁹ Murphy. There was also another daughter, Anna Wolseley (formerly Anna Murphy), to whom nothing was given by the will of said deceased. Daniel T. Murphy and Samuel J. Murphy each afterward conveyed his one twenty-fourth to the plaintiff herein, so that at the time of the decree the plaintiff was the owner of fourteen twenty-fourths of the premises. Afterward the widow, Anna L. Murphy, died, leaving a will by which it is claimed by some of the parties that she devised her six twenty-fourths to her three daughters, the aforesaid Mary Helen Dominguez, Frances Josephine, and Mary Margaret Isabella. This will was admitted to probate in the superior court of Alameda county, but it was afterward contested by the brothers and said Anna Wolseley, and the probate thereof was set aside by the court. But, upon appeal, the judgment of the said superior court was reversed in this court, and judgment ordered admitting the said will to probate. After the remittitur went down, however, another appeal was taken, which is still pending. The said three daughters of Anna L. Murphy, deceased, who claim under her will as aforesaid, set up in their answers that each of them, in addition to the ownership of one twenty-fourth part of the premises, is also entitled to an undivided one-third of the one-fourth of said lands held by their said mother. The defendant, Victor H. Metcalf, who is the administrator of the estate of said Anna L. Murphy, deceased, set up in his answer that the estate was the owner of the undivided one-fourth of said premises. The said Anna Wolseley, Daniel T. Murphy, and Samuel J. Murphy filed answers in which they denied the validity of the said will of their mother, Anna L. Murphy, and set up that each is entitled to an undivided one-seventh of the undivided one-fourth of said premises, which belonged to their mother at the time of her death.

The said Eugene K. L. Murphy also died, leaving a will; and there is a contest between his heirs and certain trustees named in his will as to his one twenty-fourth of the premises; but as there is no appeal taken ⁴³⁰ by the trustees or heirs, or any other person, from that part of the decree which disposes of his one twenty-fourth, that part of the decree need not be here considered.

The court found, and the interlocutory decree adjudges, that the plaintiff is the owner of fourteen twenty-fourths of the prem-

ises; that Mary Helen Dominguez is the owner of one twenty-fourth; that Frances Josephine Murphy is the owner of one twenty-fourth; that Mary Margaret Isabella Murphy is the owner of one twenty-fourth; and that the successors in interest of Eugene K. L. Murphy, deceased, are the owners of one twenty-fourth; and there is no objection made by anyone to those parts of the findings and decree above stated. However, as to the remaining one-fourth, or six twenty-fourths, which belonged to Anna L. Murphy at the time of her death, the court finds that it belongs to those who are entitled to the real estate of which said Anna L. Murphy died seised, but does not determine who of the several parties are so entitled, and in what proportion they are entitled. The decree determines that said one-fourth is in the estate of said Anna L. Murphy, deceased, but leaves it to the probate court, where the administration of said estate is pending, to determine how it should be distributed.

From this decree Mary Helen Dominguez, Frances Josephine Murphy, Mary Margaret Isabella Murphy, and Victor H. Metcalf, administrator, appeal; and the point made by them for reversal is that the decree does not definitely ascertain and determine who of the various parties are entitled to the interest of the said Anna L. Murphy, deceased, and in what proportion they are so entitled. This is the only question presented in the case.

Under these circumstances it would seem just to allow the sale to be made, leaving that part of the proceeds which goes to the successors in interest of Anna L. Murphy, deceased, to await the determination of the said contest in the probate court; but, under former ⁴³¹ decisions of this court, and the provisions of the code upon the subject, the question involved is not free from difficulty. If the court below had retained the case for a reasonable time, to allow the probate court to determine the contest before it—a course pursued by courts of equity in early times, when they held that they could not try title in an action for partition—some embarrassment which now arises might perhaps have been avoided. But we have to take the case as we find it, and the question now is, Must the decree be reversed for the said reasons urged by the appellants?

It seems to be settled by the authorities that, as a general rule, all parties to an action for partition are actors; that each party, whether plaintiff or defendant, has the same rights, other things being equal, as any other party; that each party may set up in his pleading the nature and extent of his interest in the premises

involved, and have the same ascertained and adjudicated; that the adjudication must appear in the interlocutory decree; that these principles apply ordinarily to a case where the premises cannot be divided and must be sold, as well as to a case where there can be a strict partition; and that a decree which does not adjudicate the interests of the respective parties is invalid: *Morenhout v. Higuera*, 32 Cal. 290; *De Uprey v. De Uprey*, 27 Cal. 336; 87 Am. Dec. 81; *Bollo v. Navarro*, 33 Cal. 459; *Lorenz v. Jacobs*, 53 Cal. 24; *Emeric v. Alvarado*, 64 Cal. 529; *Stevens v. McCormick*, 90 Va. 735; *Freeman on Cotenancy and Partition*, sec. 516. It is to be observed, however, that in the cases above cited the subject was being dealt with generally, and not in view of any such particular phase of the question as is presented by the case at bar. In some of the cases there had been no ascertainment or adjudication at all by the trial court of the interests of any of the parties to the action. In the case at bar, a sale of the premises was confessedly necessary; the interests of all the parties in the proceeds of the sale were definitely settled by the decree, except only the interests, as between themselves, of certain parties ⁴³² who were contesting claimants of the interests of a deceased cotenant; the quantity of interest which belonged to said cotenant at the time of her death, and which became part of her estate, was also definitely determined; and a contest between said claimants involving their conflicting rights to said deceased cotenant's interest had been inaugurated, and was pending and undetermined in the probate court, which had full jurisdiction of that subject. These facts, or facts similar to them, did not exist in any of the cases to which our attention has been called; and they cannot, therefore, be held as determining definitely how the law should be applied to a peculiar condition not contemplated when the decisions were made. For instance, *Lorenz v. Jacobs*, 53 Cal. 24, and *De Uprey v. De Uprey*, 27 Cal. 336, 87 Am. Dec. 81, are the only cases decided by this court which involved a decree for the sale of the land instead of a partition by metes and bounds. In the *Lorenz* case the trial court had decreed a sale of the water ditch involved, without having ascertained or determined the interest of any one party to the action; and the *De Uprey* case involves questions of pleading, practice, parties, variance, etc., which are quite different from the question presented in the case at bar. Therefore, general expressions used in the opinions in those two cases are to be taken as pertinent to the facts then before the court, and the ques-

tions there involved, and not as applicable to, and determinative of, a question not then in contemplation. We think, therefore, that the question now before us is, so far as former decisions go, an open one; and, as the conclusion of the court below is apparently a just one, the decree should not be reversed unless it is violative of some statutory provision.

The provisions of the Code of Civil Procedure upon the subject of partition are not extremely clear and definite; and some of them are almost irreconcilably inconsistent and contradictory. They certainly do not define with precision the proper procedure to be taken if the action should come to the point reached in the ⁴³³ case at bar—namely, where a cotenant had died, and, although the quantity of interest going to his estate had been definitely ascertained, there was a contest between claimants of his estate pending in the proper probate court, which could not be ousted of the jurisdiction of such contest. Of course, in such a case, neither a plaintiff nor a defendant, other than the said contestants, can have any control over the proceedings in the probate court, and new complications might arise from deaths of other parties. Must they wait until proceedings which they cannot hasten have terminated in the probate court, and which might remain there unsettled for many years? or may they proceed to a division, leaving the contestants to a particular interest to settle their claims among themselves in the proper court? We think that the latter course is a proper and just one, and within the general scope of the law and the jurisdiction of the court, at least where there is to be a sale of the entire premises and a deposit of the proceeds in court. We need not inquire whether the rule could be properly applied to a case of strict partition of the premises by metes and bounds.

Appellants rely a good deal upon section 759, and respondents upon section 774; and it is very difficult to construe the two sections so that both can stand—which of course ought to be done, if possible. Section 759 provides that "When a sale of the premises is necessary, the title must be ascertained by proof to the satisfaction of the court, before the judgment of sale can be made; . . . except that where there are several unknown persons having an interest in the property, their rights may be considered together in the action, and not as between themselves." But section 774 provides that "When the proceeds of the sale of any share or parcel belonging to persons who are parties to the action, and who are known, are paid into court, the action may be

continued, as between such parties, for the determination of their respective claims thereto, which ⁴³⁴ must be ascertained and adjudged by the court"; and provision is made for further evidence, pleadings, etc. No very satisfactory construction of these two apparently conflicting sections is given by counsel for either side. We do not, however, consider it necessary in the case at bar to absolutely determine what these sections, taken together, mean; for they evidently cannot be applied to the particular condition of this case. They clearly apply only to issues over which the court in which the partition suit is pending has jurisdiction. "The court" mentioned in either section is the court into which the parties had been brought by the action for partition; and both sections are based upon the assumption that the matters therein mentioned are matters over which that court had jurisdiction. But where the estate of a deceased cotenant is unsettled, and the administration thereof is pending in the proper probate court, and there is also pending there a contest between heirs and devisees as to who are the rightful owners of the interest of such deceased cotenant, there is no jurisdiction in the court in which the partition suit is pending to hear and determine the issues between the hostile claimants of the interest of the deceased cotenant; such jurisdiction is in the probate court. And where, as in the case at bar, the court has determined all matters over which it has jurisdiction, and has definitely ascertained all the interests of all the cotenants, except only the issues between contesting claimants in the probate court of the interest of a deceased cotenant, over which issues it has no jurisdiction, and the premises must be sold in order to effect a just division—there a decree of sale, leaving the rights of said contesting claimants to be determined in the court having jurisdiction thereof, is proper, is warranted by the general law of partition, and is not violative of any provision of the code. Section 786, which provides that the referees who make the sale may take a purchaser's receipt for his share of the proceeds, is not determinative of the question; there ⁴³⁵ are other instances provided for by the code in which it could not be applied.

The decree is affirmed.

Henshaw, J., and Temple, J., concurred.

Hearing in Bank denied.

PARTITION—CONCLUSIVENESS OF DECREE.—A decree in partition is conclusive between the parties, as to the title to the land and the fact that they are tenants in common: *Morrill v. Morrill*, 20

Or. 96; 23 Am. St. Rep. 95. The whole scope and tenor of the California statute relating to the partition of lands show that the intention was to make the one judgment of partition final and conclusive on all persons interested in the property or any part of it, of whom the court could acquire jurisdiction: *Gates v. Salmon*, 35 Cal. 576; 95 Am. Dec. 139, and note. So, in a suit for partition, it is indispensable that all cotenants not uniting in the bill should be made parties defendant: *Ferris v. Montgomery Land etc. Co.*, 94 Ala. 567; 33 Am. St. Rep. 146, and note.

PARTITION—PROBATE JURISDICTION.—Probate partition cannot be made except of estates of which the decedent died seised in severalty, and this remains true, though one of the heirs is the owner of the other moiety of the property: *Buckley v. Superior Court*, 102 Cal. 6; 41 Am. St. Rep. 135. While the probate court may be authorized to determine who has succeeded to such estate as heirs, devisees, or otherwise, it has no authority to consider or determine adverse claims to the property made by persons whose title was not acquired from or under the decedent: Extended note to *Buckley v. Superior Court*, 41 Am. St. Rep. 143.

TERALTA LAND AND WATER COMPANY v. SHAFFER.

[116 CALIFORNIA, 518.]

CONSTITUTIONAL LAW—RETROACTIVE STATUTES. WHEN VALID.—A retroactive statute is valid only when it is remedial, and does not impair contracts or divest vested rights. Whenever a statute so far alters a remedy as to impair, destroy, change, or render the right scarcely worth pursuing, it necessarily impairs the obligation of the contract upon which such right is founded, and must be denied effect.

CONSTITUTIONAL LAW—STATUTE MODIFYING RIGHT OF REDEMPTION.—If a sale has been made for delinquent taxes under a statute allowing the owner of property to redeem it within a time specified, the legislature cannot amend the law so as to impose new and more onerous conditions upon the exercise of the right of redemption.

District Attorney A. H. Swett, Attorney General W. F. Fitzgerald, and Deputy Attorney General Henry E. Carter, for the appellant.

Collier, Pillsbury & Collier, for the respondent.

⁵²⁰ SEARLS, C. Writ of mandate. The Teralta Land and Water Company (a corporation), respondent herein, filed its petition, duly verified, in the superior court, in and for the county of San Diego, showing that it was the owner of certain described lands, situate in said county of San Diego, which were sold for delinquent state and county taxes duly levied for the fiscal years 1889-90, 1890-91, and 1891-92, and purchased by the state of California.

On the twenty-fifth day of September, 1895, plaintiff, ⁵²¹ being desirous of redeeming said lands, applied to defendant, auditor of the county of San Diego, to furnish to it an estimate of the amount required to redeem the same, and demanded that such estimate be made under the statutes in force at the date of the respective sales of said land and prior to the year 1895.

The auditor refused to furnish the estimate as demanded, upon the ground that the act of March 28, 1895, was the only statute in force relating to the redemption of real estate from sales for delinquent taxes, whether such sales took place prior to the passage of said act, or afterward.

He offered to furnish an estimate under the act of 1895, but refused to do so under any prior statute. An alternative writ of mandate issued to defendant, who came in and demurred to the petition upon grounds substantially involving the proposition that the petition or sworn statement of the plaintiff did not state facts entitling plaintiff to redeem from the sales therein mentioned under any law or laws except the statute of March 28, 1895.

The court overruled the demurrer, and defendant failing to answer, his default was entered, and the writ of mandate was made peremptory. Defendant appeals from the judgment.

Under the Political Code, section 3817, as it existed prior to 1895, where real estate was sold for delinquent taxes, and the state had become the purchaser and had not disposed of the same, the former owner or his heirs, etc., had the right to redeem by paying to the county treasurer the amount of the tax due, with interest at seven per cent per annum, together with all taxes that were a lien on the real estate at the time said taxes became delinquent; an amount equal to the percentage of all subsequent taxes, interest thereon, all costs and charges, and a penalty of twenty-five per cent, etc. It became the duty of the county auditor to furnish the person desiring to redeem an estimate of the amount necessary therefor.

⁵²² The act of March 28, 1895 (Stats. 1895, p. 309), amended section 3817 of the Political Code, so that in lieu of the penalty of twenty-five per cent the redemptioner is required to pay a penalty of ten per cent if redeemed within six months from the date of sale; twenty per cent if redeemed within one year; forty per cent if redeemed within two years; sixty per cent if redeemed within three years; eighty per cent if redeemed within four years, and one hundred per cent if redeemed within five or any greater number of years after the date of sale.

The section in terms applies: "In all cases where real estate has been or may hereafter be sold for delinquent taxes to the state, and the state has not disposed of the same, the person whose estate has been or may hereafter be sold," etc.

The sole question presented for determination is this: "Is the owner of the land entitled to make redemption obliged to pay the amount to redeem required by the act of March 28, 1895, or can he redeem by paying the amount required under the laws in force at the date of sale?"

No part of the Political Code is retroactive unless expressly so declared: Pol. Code, sec. 3. This applies to amendments there-to equally with the original: *Central Pac. R. R. Co. v. Shackelford*, 63 Cal. 261.

That the legislature intended to make the amendment of 1895 to section 3817 retroactive is amply attested by the language used.

"A retrospective statute affecting and changing vested rights is very generally considered in this country as founded on unconstitutional principles, and consequently inoperative and void. But this doctrine is not understood to apply to remedial statutes which may be of a retrospective nature, provided they do not impair contracts or disturb vested rights, and go only to confirm rights already existing, and, in furtherance of the remedy, by curing defects and adding to the means of ⁵²³ enforcing existing obligations": 1 Kent's Commentaries, 465.

Remedial statutes which are retrospective, but do not impair contracts or disturb vested rights, are not unconstitutional, and the legislature may from time to time alter, change, or modify the remedy, providing in so doing they do not affect the right; but whenever they so far alter the remedy as to impair, destroy, change, or render the right scarcely worth pursuing, they necessarily impair the obligation of the contract upon which such right is founded: *Smith v. Morse*, 2 Cal. 524; *Scarborough v. Dugan*, 10 Cal. 305; *People v. Seymour*, 16 Cal. 332; 76 Am. Dec. 521; *Moore v. Martin*, 38 Cal. 428; *Tuolumne Redemption Co. v. Sedgwick*, 15 Cal. 515; *Oullahan v. Sweeney*, 79 Cal. 537; 12 Am. St. Rep. 172; *Bates v. Gregory*, 89 Cal. 387; *Dentzel v. Waldie*, 30 Cal. 138.

Appellant very properly admits that "an act which impairs the obligation of a contract, or divests a vested right, is in conflict with section 10, article 1, of the federal constitution, and with section 16 of article 1 of the constitution of the state of California."

He contends, however, that the amendment of 1895 to section 3817 of the Political Code does not impair the obligation of a contract, or divest a vested right.

His theory is, that a tax duly levied has the effect of a judgment against the person, and the lien created thereby has the force and effect of an execution duly levied against all the property of the delinquent (Pol. Code, sec. 3716), and that the sale of property upon default of payment and the right of redemption as an incident thereto is a remedy, which may be changed at any time at the will of the legislature, and though retroactive will not be invalid for that reason. In support of this position and of the argument in favor thereof council cite *Tuolumne Redemption Co. v. Sedgwick*, 15 Cal. 515; *Hibernia etc. Soc. v. Hayes*, 56 Cal. 303; *Oullahan v. Sweeney*, 79 Cal. 537; 12 Am. St. Rep. 172, and several other cases.

In *Tuolumne Redemption Co. v. Sedgwick*, 15 Cal. 515, the ⁵²⁴ change in the redemption law was made before the sale took place.

In *Kerckhoff etc. Mill etc. Co. v. Olmstead*, 85 Cal. 80, which was an action to foreclose a mechanic's lien, after a portion of the materials had been furnished, the law was amended, and it was held that the amendment shortening the time for filing a lien, but which afforded an adequate remedy, was not retroactive, and applied to pending cases of uncompleted buildings.

In *Oullahan v. Sweeney*, 79 Cal. 537, 12 Am. St. Rep. 172, the court held that an amendment to the statute after a tax sale, requiring the purchaser to give notice before applying for a deed, went to the remedy only, and was applicable to cases existing at the time the law took effect.

The question here, however, is: Can the legislature, after a tax sale, lawfully amend the law so as to apply new and more onerous conditions to the right to redeem than those which existed when the sale was made? We think this question is answered in the negative by the elementary writers and by the adjudicated cases.

Cooley in his work on Constitutional Limitations, sixth edition, at page 353, says: "So a law is void which extends the time for the redemption of lands sold on execution, or for the delinquent taxes, after the sale has been made; for in such a case the contract with the purchaser, and for which he has paid his money, is that he shall have title at the time then provided by the law; and to extend the time for redemption is to alter the sub-

stance of the contract, as much as would be the extension of the time for payment of a promissory note, so a law which shortens the time for redemption from a mortgage after a foreclosure sale has taken place is void; the rights of the party being fixed by the foreclosure and the law then in force."

Black on Tax Titles, section 175, says: "The right of redemption from a tax sale must be governed by the law in force at the time of sale; it cannot be affected by subsequent legislation." He quotes from *Merrill v. Dearing*, 32 Minn. 479, as follows: "The right of property ⁵²⁵ acquired by the purchaser at this sale and the right of redemption remaining to the owner must both be governed by the law in force at the time of sale. Neither, in our judgment, could be either abridged or enlarged by subsequent legislation. This is unquestionably so as to the right of the purchaser. The same rule ought to apply in favor of the owner as against any statute shortening the time to redeem, as it is equally unjust to legislate against the owner of the land as in his favor": *Negus v. Yancey*, 22 Iowa, 57; *Goenen v. Schroeder*, 8 Minn. 387; *Robinson v. Howe*, 13 Wis. 341; *Conway v. Cable*, 37 Ill. 82; 87 Am. Dec. 240; *Moody v. Hoskins*, 64 Miss. 468; *Caruthers v. McLaran*, 56 Miss. 371; *Wolfe v. Henderson*, 28 Ark. 304.

Blackwell on Tax Titles, fifth edition, at section 729 expresses the same views in the following language: "The law in being at the time of sale governs the right of redemption. The time can be neither lengthened or shortened by subsequent legislation. . . . The right to redeem is a condition attached to the sale, and the legislature cannot defeat it by a subsequent act. A provision affecting the period of redemption can only apply to sales after the day on which the act took effect."

The enforced sale of property on execution, or for the non-payment of taxes, institutes a contract with the purchaser which cannot be materially altered without his consent. The right of the owner to redeem is perhaps, strictly speaking, one not resting in contract, but is a right vested in him under the law, a right pertaining to the contract itself, and which in reason and justice is not more open to attack than that of the purchaser.

It has been said in a few of the many cases on the subject that so far as the right to redeem is concerned, it is not derived from any contract, but is given by the law only, and the time within which it may be exercised may be shortened by the legislature, provided a reasonable time is left within which to exercise it, without impairing the obligation of the contract.

⁵²⁶ We think these cases are opposed to the weight of authority, but concede that they are not, and we think the case at bar is clearly distinguishable from them.

Here an additional burden is cast upon the redemptioner, whereby his right to redeem is subjected to the payment of a sum of money greatly in excess of that required of him under the statute which conferred the right upon him.

To require a party to perform an act at a time different from that required by a former statute is a difference only in point of time, and may be said to affect the remedy only, but to require him to pay a sum of money greatly in excess of that required by a former statute is to impose upon him a burden having no relation to the remedy.

In *Hillebert v. Porter*, 28 Minn. 496, it was held that a law which increased the rate of interest to be paid on redemption of a pre-existing mortgage could not be upheld.

What the state could sell under the tax sale was limited by what the purchaser could purchase, and that was the right to have the title subject to the owner's right to redeem upon the payment of a given sum of money at any time before the state parted with its interest in the property. This right of redemption became a condition of the contract of purchase, and could not in reason or justice be ignored or changed by a subsequent statute any more than the sale itself. It was an essential element of the contract of sale, and not a mere naked right to be changed or abridged as a mere matter of public policy. Though intimately connected with the remedy, it was not a part of the remedy, but a substantive right preserved to the redemptioner, and equally sacred with those acquired by the purchaser, which latter rights it limited. It was a right of property remaining in the former owner after the exhaustion of the remedy by sale, and the statute which, passed after the sale, seeks to impair this right by adding new burdens to its exercise, is violative of constitutional guaranties.

⁵²⁷ We recommend that the judgment appealed from be affirmed.

Britt, C., and Belcher, C., concurred.

For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

Van Fleet, J., Harrison, J.,
McFarland, J., Henshaw, J.,
Garoutte, J.

STATUTES—WHEN VALID THOUGH RETROSPECTIVE.—Remedial statutes, though of a retrospective nature, are valid, provided they do not impair contracts or disturb absolute vested rights, and only go to confirm rights already existing, and in furtherance of the remedy by curing defects and adding to the means of enforcing existing obligations: *Shields v. Clifton Hill Land Co.*, 94 Tenn. 123; 45 Am. St. Rep. 700, and note. See, also, *International Bldg. etc. Assn. v. Hardy*, 86 Tex. 610; 40 Am. St. Rep. 870, and *People v. Common Council*, 140 N. Y. 800; 37 Am. St. Rep. 563, and note.

YNDART v. DEN.

[116 CALIFORNIA, 533.]

INTEREST UPON INTEREST, LIMITATION UPON RATE OF.—Under a statute declaring that the parties to any contract in writing whereby any debt is secured to be paid may agree that if the interest on such debt is not punctually paid, it shall become part of the principal and thereafter bear the same rate of interest as the principal debt, it is not within the power of the parties to make a valid agreement that interest not paid when due shall bear a rate of interest greater than that which the principal debt bears, and such agreement being invalid and no other agreement being made respecting the interest upon interest, it cannot be allowed at any rate whatever.

INTEREST UPON INTEREST IS NOT ALLOWED UNLESS it has been contracted for in writing, and if the writing is invalid for stipulating for a greater rate than allowed by law, no interest whatever will be allowed upon the interest in default.

Boyce, Taggart & Kellogg, for the appellants.

Richards & Carter, for the respondent.

535 **CHIPMAN, C.** This is an appeal from the final judgment given in favor of the plaintiff upon foreclosure of certain four mortgages of real estate. The appeal is taken on the ground, as claimed in appellants' brief, that the clause in each of the notes, secured by the mortgages respectively, relating to interest was illegal and void, in attempting to give a penalty for nonpayment of interest; and that the decree is excessive, and for an amount beyond what the plaintiff was rightly entitled to recover.

One of the notes bears interest at ten per cent per annum, and three bear interest at eleven per cent per annum, payable in each case semi-annually. In each of said notes the following provision is found: "If any installment of interest be not paid when due, the amount of such installment shall bear interest at 20 per cent per annum from the time the same was due until paid; or at the option of the holder of this note, in default of pay-

ment of interest at the time herein provided, the whole sum, principal and interest, shall be due and payable."

Demurrer to the complaint was interposed and overruled, but defendants failed to answer, and their default was entered. No point is urged on the demurrer. The ⁵³⁶ notes were all past due when the action was commenced. Appellant contends: 1. The deferred installments of interest cannot bear a greater rate of interest than the principal debt; 2. If interest is allowed on deferred installments, by implication it must be limited to the legal rate; 3. If the penalty clause in the notes is void, no interest on deferred payments of interest can be recovered.

1. Appellant relies in support of his first contention upon the provision of section 1919 of the Civil Code, as construed in the case of Savings etc. Soc. v. Horton, 63 Cal. 105, and Dean v. Applegarth, 65 Cal. 391. It is claimed that these cases decide that it is not competent for the parties to contract that interest upon interest can be legally enforced or fixed beyond the rate to be borne by the principal. Section 1919 reads as follows: "The parties may, in any contract in writing whereby any debt is secured to be paid, agree that if the interest on such debt is not punctually paid, it shall become a part of the principal, and thereafter bear the same rate of interest as the principal debt."

It is replied by respondent to the point that the cases upon which appellant relies "do not seem to have been elaborately argued, or the question carefully considered, . . . and we may consistently say that, if not directly overruled, they are rejected as barren." The question is an important one, and should be definitely settled if it has not been.

The case of Savings etc. Soc. v. Horton, 63 Cal. 105, is not fully reported; the provisions of the note are not given, nor is the scope of the complaint stated; no synopsis of the briefs is given, nor are the facts stated in the opinion. The opinion is rendered per curiam, and two of the justices dissented, but upon what grounds does not appear. It was a default decree, and was reversed because in excess of the claim made in the complaint. The opinion concludes as follows: "The attention of the court below is directed to section 1919 of the Civil ⁵³⁷ Code in computing interest upon the interest which is not punctually paid. That section declares that the parties may agree that it shall become a part of the principal, and thereafter bear the same rate of interest as the principal debt. [Italics are in the report.] This appears to us to be the limit." There was a petition for rehearing denied.

It would seem fair to conclude that the note there in question at least provided for payment of interest upon interest at a rate greater than that fixed for the principal, but whether it provided also, as in the notes here in question, that the interest upon the interest was not to become a part of the principal, but to run independently of the interest on the principal, cannot be assumed.

The case of *Dean v. Applegarth*, 65 Cal. 391, was more fully reported. The terms of the note are stated to be: "That the principal was to bear interest at one per cent per month, and it was agreed that in case default should be made in the payment of any of the interest as stated above, that such installment or payment thus in default should bear interest from the day of maturity until payment, at the rate of two per cent per month, compounding monthly." It was also provided that at any time during such default the entire unpaid balance of the principal sum should, at the option of the holder of the note, and not otherwise, become due and payable, and the principal sum so due and payable should bear interest thereafter at the rate of two per cent per month, compounding monthly until paid. When the action was commenced the note, by its terms, had become due, and it did not appear from the complaint that any option was made in any way by plaintiff (mortgagee) prior to the commencement of the action, at which time the note by its terms was due. As to the interest on the principal sum compounding at the increased rate of two per cent, the court said the provisions of the note did not apply because the option had not been exercised except by bringing the suit after the maturity of the note. The court said: "As to the interest on interest ⁵³⁸ in default, when default was made in the payment of any monthly installment, it had become due and payable. No election was required to make that so. The plaintiff under the contract had a right to have such installment unpaid bear interest. But it cannot be made to bear interest at a rate greater than that borne by the principal debt (Civ. Code, sec. 1919), which in this case is one per cent per month. This is the construction placed upon section 1919 of the Civil Code in *Savings etc. Soc. v. Horton*, 63 Cal. 105. The section 1918 of the Civil Code is limited by section 1919. The latter section applies specifically to agreements to pay interest on interest, and its particular words cannot be controlled by the general language of the preceding section, which refers to a different subject, and can have full application without affecting the pro-

visions of the section which follows it." The decision of the court below was reversed because more interest was allowed than should have been.

In the case in 63 California, *supra*, Mr. Justice Thornton and Mr. Justice Myrick dissented, but in the case in 65 California, *supra*, Mr. Justice Thornton delivered the opinion in which Mr. Justice Myrick concurred. We must, therefore, assume that the dissent in the earlier case was on other grounds, and that the point under discussion was presented in both cases and duly considered.

The provisions of the notes in the particular now being examined are apparently the same; in both cases the interest on the defaulted interest was to bear interest until paid at the increased rate, and was not by the terms of the notes to become part of the principal sum. The rule laid down in *Dean v. Applegarth*, 65 Cal. 391, has stood unquestioned in this court since 1884, so far as I have been able to discover, until the case of *Thompson v. Gorner*, first decided in Department (Cal., April 19, 1894), and finally in Bank, 104 Cal. 168, 43 Am. St. Rep. 81, in which respondent claims a different rule was laid down. In the case ⁵³⁹ just referred to the note provided as follows: "With interest thereon (the principal sum) . . . from the date hereof until paid, at the rate of eight per cent per annum, payable monthly in advance, and if said principal or interest is not paid as it becomes due it shall thereafter bear interest at the rate of one per cent per month." So far as the question here presented is concerned, the provisions of this note differ from the notes in the case at bar. The provision of the notes in this case is: "If any installment of interest be not paid when due, the amount of said installment shall bear interest at twenty per cent per annum from the time the same was due until paid" (the interest on the principal sum being ten per cent in one and eleven per cent in the others).

In the case of *Thompson v. Gorner*, 104 Cal. 168, 43 Am. St. Rep. 81, the provisions were that "if said principal or interest is not paid as it becomes due it shall thereafter bear interest at the rate of one per cent per month." It is not entirely clear as to whether the additional interest is to be computed on defaulted interest or defaulted principal. The opinion in the Department was written by Mr. Commissioner Searls, and in Bank by Mr. Justice McFarland. A careful reading of both opinions will fail to disclose that interest upon interest was claimed or allowed. The court in Bank allowed "judgment for the amount of the

principal and interest thereon from and after February 20, 1892, at one per cent per month." Interest had been paid at eight per cent up to that date and accepted by the plaintiff (the holder of the note), and the court held that acceptance of the interest was a waiver of any claim for additional interest prior to that time, but not as to the future.

It is to be observed, however, that neither the learned justice nor the learned commissioner referred to section 1919 of the Civil Code, nor to the case in 63 California, *supra*, nor the case in 65 California, *supra*, nor does it appear that the attention of either was called to that section in the briefs of counsel. "Plaintiff's points ⁵⁴⁰ and authorities were very meager, covering only one page and referring only to the question of penalty": *Thompson v. Gorner*, 104 Cal. 170; 43 Am. St. Rep. 82, per McFarland, J. I think if this case had been intended to overrule *Savings etc. Soc. v. Horton*, 63 Cal. 105, and *Dean v. Applegarth*, 65 Cal. 391, some mention of that fact would have been made, and if a new interpretation of section 1919 had been intended that fact would have been disclosed. Attention is also drawn by respondent to a recent opinion by Mr. Commissioner Britt in the case of *Finger v. McCaughey*, 114 Cal. 64.

In that case the note read: "With interest from date at the rate of ten per cent per annum, provided this note is paid at maturity, but if not paid at maturity, then it shall bear interest at the rate of twelve per cent per annum from its date until paid, and if the interest is not paid at the end of one year from date, it shall become a part of the principal and bear twelve per cent interest per annum."

In this case counsel for appellant called attention to section 1919 of the Civil Code, and to the cases in 63 and 65 California, *supra*, and claimed that by the terms of the note it precludes anything but simple interest at the rate of ten per cent per annum. Respondent cited *Thompson v. Gorner*, 104 Cal. 170, 43 Am. St. Rep. 81, as deciding adversely to appellants' contention. The learned commissioner said: "It is competent for the parties to agree upon an increased rate contingent upon nonpayment of either principal or interest when due": Citing *Thompson v. Gorner*, 104 Cal. 170; 43 Am. St. Rep. 81. We see no substantial ground for distinguishing this case from that; and the court gave compound interest for one year only at the increased rate of twelve per cent.

In both cases last above referred to the notes provided: 1. In the case of *Thompson v. Gorner*, 104 Cal. 170, 43 Am. St. Rep.

81, the provision was that if the principal or interest is not paid as it becomes due it shall thereafter bear interest at the rate of one per cent per month. The decree may well be assumed to have covered interest on the principal ⁵⁴¹ only. 2. In the case of *Finger v. McCaughey*, 114 Cal. 64, the provision was interest from date at ten per cent per annum, provided the note is paid at maturity, but if not paid at maturity then it shall bear interest at twelve per cent from its date until paid; and if the interest is not paid at the end of one year from date, it shall become part of the principal and bear twelve per cent interest per annum. I do not think that the precise question decided in *Savings etc. Soc. v. Horton*, 63 Cal. 105, and *Dean v. Applegarth*, 65 Cal. 391, is necessarily involved in either one of the two later cases just examined, nor do I think that the provisions of the notes in these two later cases are the equivalent of the provisions of the notes now before us.

In the two later cases it may well be said that upon the contingency named—nonpayment of principal when due—it, the principal, shall bear the increased rate of interest. It is a part of the contract as to payment of the principal, and it is as much to be regarded as the part relating to the lower rate; both rates are given, one to be in one event and the other in another. But in the case before us it is the defaulted interest that must bear the increased rate, while the rate on the principal remains unaffected and unchanged. Now it was exactly this provision in *Dean v. Applegarth*, 65 Cal. 391, that the court said was prohibited by section 1919. "This section," said the court, "applies specifically to agreements to pay interest on interest, and its particular words cannot be controlled by the general language of the preceding section, which refers to a different subject," etc.

It will be noticed that if the construction given to the note in *Finger v. McCaughey*, 114 Cal. 64, be correct, that the principal by its terms bore twelve per cent per annum, then it is not obnoxious to this section, for the defaulted interest was to bear only twelve per cent, and this the section expressly permitted to be done. The section is not designed to restrict the rate of interest that may be agreed upon as to the principal—this has no limit (sec. 1918)—but it is aimed at rates of interest ⁵⁴² greater than those fixed for the principal to bear, and declares that the parties may agree that if the interest is not punctually paid, it may become a part of the principal, and thereafter (not before) may bear the same rate of interest (no more) as the principal debt.

The respondent calls attention to the fact that section 1919 is taken bodily from the statute of 1850 (1 Hittell's Gen. Laws, sec. 3858), and was adopted for the simple purpose of legalizing compound interest: Citing the note of the code commissioners. This need not be questioned. To say that when interest is not paid when due it shall become a part of the principal, and thereafter bear like interest with the principal—which is the usual form—is strictly within the section, and is compound interest. But to say that the principal shall bear ten per cent interest per annum, and, if not so paid, it—the interest—shall thereafter bear twenty per cent, is what is here attempted, but is what this court has said cannot be done as the law now stands. It is not a question as to penalties; it is a question as to the right to contract to this effect.

Section 1918 of the Civil Code provides that "parties may agree in writing for the payment of any rate of interest, and it shall be allowed, according to the terms of the agreement." But the legislature has placed this limit upon the power to agree as to interest, to wit, that the rate of interest upon interest, or compound interest shall not be greater than that fixed upon the principal. Section 1918 presupposes an indebtedness which is the principal; as to that, any rate of interest, however extortionate or unconscionable, may be agreed upon by the parties: *Boyce v. Fisk*, 110 Cal. 107; but as to the interest yet to be earned, no rate of interest on that shall be still higher or any higher. Counsel for respondent, with much seeming force, say: "If section 1919 really forbids the placing of a higher rate on the interest than originally stipulated for the principal, unless, at the same time, the rate on the principal is increased, the two last referred to decisions (meaning ⁵⁴⁸ *Savings etc. Soc. v. Horton*, 63 Cal. 105, and *Dean v. Applegarth*, 65 Cal. 391), have confined its prospective power to technical operation upon one, and probably the least unconscionable, of a thousand and one devices to secure prompt payment of the compensation for the use of the money, or as damages for its detention, or for the creditor's forbearance, all of which devices, with this one solitary exception, are indorsed by the courts as legal and binding." The obvious reply to this is, that we have no concern with the law, except to rightly interpret it as we find it. If we have not yet reached the point in legislation to adopt laws against usury, and if we still permit agreements to be made for the payment of ten per cent per month, or any other unconscionable per cent per month interest on the money loaned, it would seem that a provision to limit the

rate of interest that may be charged on the interest, to a point not in excess of that placed upon the principal, is at least humane, if it is "a curtailment of the freedom to contract in reference to the use, forbearance, and detention of money granted by the preceding section," as suggested by respondent. Respondent further suggests that "the provision for interest upon interest represents more than compensation for the use or detention of the interest money; it is one of two obligations stipulated for to insure prompt payment, and obviate loss by delay, and thus imports a consideration outside what supports compound interest, and which brings it within the category of recognized subjects of unlimited contract between lender and borrower."

But the code law embraces the whole subject of interest and must control it. There can be no such thing as unlimited contract between lender and borrower as to payment of interest outside these code provisions. The code says to the lender, you may exact unlimited interest on your loan, but on the interest to be earned you must keep within this limit. Our law is quite liberal to the creditor. We are reluctant to extend its liberality. We can well see how a borrower in his anxiety may agree ⁵⁴⁴ to almost any terms as to the interest on the interest, believing he will be able to avoid the default that may bring disaster upon him, but the legislature seems to have anticipated this prevalent weakness of the borrower, and has endeavored in a measure to shield him from his impetuosity. The legislature may also have considered that the lender who would part with his money for one per cent per month interest should be content to receive one per cent upon the accumulating interest; it may have considered that interest money is of no more worth than the principal. However this may be, with the policy of the law we can, as a court, have nothing to do.

2. Appellant claims further that if interest is allowed on deferred installments of interest by implication, it must be limited to the legal rate. He claims in his third point that the compound interest claimed being illegal there is no contract to pay any compound interest. To this respondent replies that the most that can be claimed for the cases of Savings etc. Soc. v. Horton, 63 Cal. 105, and Dean v. Applegarth, 65 Cal. 391, is that they limit the rate of compound interest to the rate the principal bears; that only the excess can be treated as void and be rejected.

In *Dean v. Applegarth*, 65 Cal. 391, the court directed a modification of the judgment so that the compound interest should conform to the rate provided to be paid on the principal. Appellant assails this conclusion. He says: "The point was not dwelt upon, nor was the court's attention called to the fact that, if the provisions in the note could not be upheld according to its terms, there was no provision for recovering interest at the same rate as that borne by the principal debt."

In order that the point now under discussion may be clearly understood, I will restate the provisions of one of the notes, and they are all alike in this particular: "With interest thereon in like gold coin from date until paid at the rate of ten per cent per annum, payable semi-annually at the end of each and every six months ⁵⁴⁵ from date. If any installment of interest be not paid when due, the amount of said installment shall bear interest at twenty per cent per annum from the time the same was due until paid."

In the case of *Doe v. Vallejo*, 29 Cal. 392, Mr. Justice Sawyer, speaking for the court, said: "The only remaining question is as to the interest. The note was for fifteen thousand dollars and interest at one and one-half per cent per month; 'said interest to be due and payable at the end of every six months.' The interest was not paid as it fell due, and the plaintiff claims that he is entitled to interest on each installment of interest from the time it fell due, by the terms of the contract, till paid, at the rate of ten per cent per annum."

The statute then in force is found in Wood's Digest, 551 (act of March 13, 1850, to regulate interest on money). Section 1 of that act is substantially the same as section 1917 of the Civil Code.

Section 2 of that act is similar to section 1918 of the Civil Code, only the code limits the agreed interest to entry of judgment, while the old act gives the same interest on the judgment that was given in the contract. Section 3 of the act of 1850 is verbatim the same as section 1919 of the Civil Code.

In *Doe v. Vallejo*, 29 Cal. 392, the trial court did not allow interest at the statutory rate of ten per cent upon the accrued interest installments. Mr. Justice Sawyer said: "If section 1 contained the only provision upon the subject, there would be great force in the position taken by the appellant, and—although there is some conflict on the point—the authorities greatly preponderate in his favor: Citing numerous cases.

"But the third section of the statute, authorizing parties to contract in writing for interest upon interest in default of punctual payment also bears upon the question. And this section has already been construed by our predecessors to exclude interest after it falls due, unless expressly so agreed in writing: *Montgomery v. Tutt*, 11 Cal. 316. The question in that case was precisely ⁵⁴⁶ similar in principle to the one now under consideration"; and the judgment was affirmed in *Doe v. Vallejo*, 29 Cal. 392.

A comparison of the notes here and the notes in *Doe v. Vallejo*, 29 Cal. 392, will show no substantial difference as to payment of interest in the first part of the notes, and, as the law then and now is substantially the same, I see no escape from holding that there is no agreement to pay interest on the interest, without overruling *Doe v. Vallejo*, 29 Cal. 392, unless the subsequent clause in the notes can be held to import an agreement to pay interest on interest. The notes do provide for payment of interest upon interest, but it is at a rate, as we have said, unauthorized by law. The question remains: Can this court find that any contract exists by implication or otherwise to pay interest upon interest at any rate? It seems to me the imperative logic of the contract is that the agreement to pay compound interest being illegal, there is no agreement at all to pay interest upon interest, and this court cannot make one for the parties. It must not be forgotten that there is a wide difference between interest upon money loaned and interest upon interest accrued. In the former case the law says when money is loaned it is presumed to be made upon interest: Civ. Code, sec. 1914. And, as we have seen, the rate of interest may be fixed by the parties without limit: Civ. Code, sec. 1918. But interest upon interest must be contracted for in writing, and in no case must bear a greater rate than that placed upon the principal debt: Civ. Code, sec. 1919.

Except in certain cases where courts of equity may order interest to be computed with rests, no interest is computed on the accrued interest, it being a rule of law that interest shall not be compounded unless by stipulation of the contract: *Estate of Den*, 35 Cal. 692. And see cases cited, *supra*; *Savings etc. Soc. v. Horton*, 63 Cal. 105; *Dean v. Applegarth*, 65 Cal. 391; *Montgomery v. Tutt*, 11 Cal. 316; *Doe v. Vallejo*, 29 Cal. 392.

Recurring to *Finger v. McCaughey*, 114 Cal. 64, Mr. Commissioner ⁵⁴⁷ Britt, in the opinion, said: "But in such a contract

the right to compound interest must find support in the terms employed by the parties; and the stipulation in this note [the note there in suit], that if the interest is not paid at the end of one year from date it should become part of the principal and bear interest, looks to the compounding of the interest accruing June 6, 1890, but not afterward." The note was dated June 6, 1889, and only one year of compound interest was allowed under the terms of the note.

This view makes any further discussion of appellant's third point unnecessary. My conclusion is, that the decisions of this court in *Savings etc. Soc. v. Horton*, 63 Cal. 105, and *Dean v. Applegarth*, 65 Cal. 391, are neither "overruled," nor "rejected as barren," by any subsequent decisions, and that the decree in this case allows excessive interest, and that interest should be computed at the annual rate of ten and eleven per cent upon the respective notes, and that no interest can be compounded.

The respondent by the terms of the note had the option, upon default of payment of interest as provided, to declare the whole sum, principal and interest, to be due. The first note and mortgage was dated April 16, 1892, and six months thereafter he could have exercised his option. The other notes and the several mortgages given for their security came along later, and he had a like option as to each. He chose to wait until April 20, 1895, without manifesting any intention to avail himself of the option, and then only by suit, during all which time the notes were running and no payments either of principal or interest were made. Having failed to bring the defaulting makers of the notes to face their obligations may be unfortunate to the holder, but the consequences are the clear result of the contracts made, and he cannot reasonably complain. If he had adopted the almost universal formula of providing that the interest when due should become a part of the principal and thereafter bear like interest as the principal, ⁵⁴⁸ he would have brought himself exactly within the law, and this case would never have come here.

I am, perhaps, not justified in having taken so much space to reach a conclusion, but the fact that the decision of this court of long standing was seriously assailed, and was claimed to have been recently overruled, seemed to demand that the question be placed beyond dispute.

As the only objection made to the decree is that excessive interest was allowed, I see no necessity for doing more than to di-

rect a modification of the judgment, and we recommend that the cause be remanded, with directions to modify the decree in accordance with the views laid down in this opinion, as of the date the judgment appealed from was entered; and when thus modified and entered that the decree stand affirmed.

Searls, C., and Britt, C., concurred.

For the reasons given in the foregoing opinion, it is ordered that the cause be remanded, with directions to modify the decree in accordance with the views laid down in this opinion, as of the date the judgment appealed from was entered; and when thus modified and entered the decree will stand affirmed.

Harrison, J., Garoutte, J., Van Fleet, J.

INTEREST UPON INTEREST—WHEN ALLOWED.—Upon the question as to when compound interest will be allowed, the cases are in conflict and cannot be harmonized. For a discussion of the question with citation of cases, see *Mathews v. Toogood*, 23 Neb. 536; 8 Am. St. Rep. 131; also, *Calhoun v. Marshall*, 61 Ga. 275; 34 Am. Rep. 80, and note; *Banks v. McClellan*, 24 Md. 62; 87 Am. Dec. 594.

CASES
IN THE
SUPREME COURT
OF
COLORADO.

CUNNINGHAM v. CITY OF DENVER.

[28 COLORADO, 18.]

MUNICIPAL CORPORATIONS, NOTICE TO OF CLAIMS FOR INJURIES, CONSTITUTIONALITY OF STATUTE REQUIRING.—A statute providing that before a municipality therein named will be held liable to any person injured upon any of its streets or public places, such person, or some one in his behalf shall, within thirty days after receiving such injuries, give the mayor or city council notice in writing of such injuries, stating when, where, and how they occurred, and the extent thereof, is constitutional.

CONSTITUTIONAL LAW—SPECIAL LEGISLATION.—Under the constitution of Colorado, the legislature may amend the charter of a municipality enacted before the adoption of such constitution, the only limitation imposed being that the amendment must be revisory or amendatory of a pre-existing charter.

A MUNICIPAL CORPORATION IS NOT LIABLE FOR INJURIES RECEIVED from the neglect to keep its streets in repair, unless it had notice of the defect complained of, or of facts equivalent to such notice.

Action against the city of Denver and Theodore Griffin, street commissioner thereof, to recover for injuries alleged to have been received by the plaintiff from stepping, without fault or negligence on his part, into a hole in a public street. The jury, under instructions from the court, returned a verdict in favor of the defendants.

George W. Forman, for the plaintiff in error.

A. B. Seaman and L. K. Pratt, for the defendants in error.

19 HAYT, C. J. There is no evidence in the record to connect the defendant Griffin in any way with the accident to plaintiff, or tending to show that he was guilty of any degree of negligence in the premises. Moreover, the action of the district court

in directing a verdict in favor of this defendant is not questioned in this court, and it will be affirmed without further comment.

The peremptory instruction of the district court in favor ²⁰ of the defendant city was predicated upon the failure of plaintiff to comply with the following provision of the city charter: "Before the city of Denver shall be liable for damages to any person injured upon any of the streets, avenues, alleys, sidewalks, or other public places of the city, the person so injured, or some one in his behalf, shall, within thirty days after receiving such injuries, give the mayor or city council notice in writing of such injuries, stating fully in such notice when, where, and how the injuries occurred, and the extent thereof": Charter of Denver, art. 9, sec. 9. The failure of plaintiff in this respect is admitted, but the consequence of such failure is sought to be avoided by an attack upon the constitutionality of the provision.

Municipal corporations are creatures of the statute, and have only such powers, privileges, and duties as are provided by law, constitutional or statutory, and the necessary powers implied from those conferred. The legislature regulates the duties and obligations of these corporations in such manner as will, in its judgment, best subserve the public interests. In respect to damages incurred by injuries upon its streets, it may impose an obligation or not upon the city, and it may, as a logical sequence of this power, prescribe such limitations as it deems proper. Provisions like the one attacked in this case are in force in nearly all the large cities of the country, and, if repeated and harmonious decisions of the courts can settle the question of the constitutionality of such legislation, it is no longer open to attack: *Gay v. Cambridge*, 128 Mass. 387; *Susenguth v. Ramtoul*, 48 Wis. 334; *Iaw v. Fairfield*, 46 Vt. 425; *Nichols v. Minneapolis*, 30 Minn. 545.

Neither does the act in question violate the inhibition of the constitution against special legislation. The city of Denver was incorporated under a special charter in 1861, and the right of cities so incorporated to maintain their corporate existence is recognized by the constitution, while the power of the legislature to amend such special charters is implied from this and other provisions of our state constitution, the only limitation being that only such amendments can be made ²¹ as are revisory or amendatory thereof: *Denver v. Barron*, 6 Colo. App. 72; *Brown v. Denver*, 7 Colo. 305; *Carpenter v. People*, 8 Colo. 116; *Darrow v. People*, 8 Colo. 426; *In re City of Denver*, 18 Colo. 288.

The original charter of the city of Denver provides that "the inhabitants of the city of Denver are hereby constituted a body corporate and politic, with perpetual succession, and the right to sue and be sued, to plead and be impleaded, in all courts of equity." This language has appeared in all the city charters up to the present time, and the provision with reference to notice is clearly a legitimate amendment or revision of the original charter, and therefore valid.

Aside from this, the ground of the action against the municipality being its neglect to keep the street in repair, in order to give a person injured a right of action against the corporation in this class of cases it must be alleged and proved that the city had notice of the defect, or had notice of facts equivalent thereto. The city is only responsible for reasonable diligence in repairing the defect, or taking the proper precautions to prevent accident, after being advised of the defective condition of its streets: *Denver v. Dunsmore*, 7 Colo. 328; *Boulder v. Niles*, 9 Colo. 415.

An examination of the abstract and transcript in this case discloses that plaintiff entirely failed to furnish evidence that notice of the defective condition of the street was brought home to the city prior to the accident. He rested his right of recovery in this respect upon proof of the existence of the hole at the very instant of the accident. He says that in passing along the street at night his foot became wedged in this hole, and he was thereby thrown violently to the ground and against a hydrant, by which means the injuries complained of were caused. No attempt was made to show that the city had notice of the defective condition of this crossing, and evidence of facts from which such notice can be inferred is not to be found in this record.

The judgment of the district court must be affirmed.

MUNICIPAL CORPORATIONS—PRESENTATION OF CLAIMS FOR DAMAGES—STATUTES REGULATING.—It is usual in statutes respecting county, township, and other municipal government to provide that all claims against them shall be presented to, and allowed or rejected by, the trustees, supervisors, commissioners, town council, or some other body, and that no action shall be maintained upon such a claim unless it shall have been so presented: Monographic note to *Commissioners v. Heaston*, 55 Am St. Rep. 203. For constructions placed upon such statutes, see *Kelley v. Madison*, 43 Wis. 638; 28 Am. Rep. 576; *Sutton v. Snohomish*, 11 Wash. 24; 48 Am. St. Rep. 847; *Commissioners v. Heaston*, 144 Ind. 583; 55 Am. St. Rep. 192.

MUNICIPAL CORPORATIONS—DEFECTIVE STREETS—INJURIES RESULTING FROM—NECESSITY OF NOTICE.—In the absence of notice, actual or implied, a city is not liable to a traveler

for injury resulting to him from the defective condition of a coal-hole in a sidewalk: *Duncan v. Philadelphia*, 173 Pa. St. 550, 51 Am. St. Rep. 780, and note; *Sutton v. Snohomish*, 11 Wash. 24; 48 Am. St. Rep. 847. See, also, *Lorence v. Ellensburg*, 13 Wash. 341; 52 Am. St. Rep. 42, and note, as to what constitutes constructive notice of defects in streets.

WATERS v. PEOPLE.

[23 COLORADO, 33.]

CRUELTY TO ANIMALS, SHOOTING DOVES FOR AMUSEMENT.—If a club keeps doves for the purpose of shooting at them for amusement and to test the skill of its members, and such doves are placed in a trap and released therefrom to be shot at for sport, though those which are killed are afterward used for food, the persons engaged in such shooting are guilty of violating a statute of the state declaring that every person who tortures, torments, or needlessly mutilates or kills any animal, or causes or procures it to be done, shall, upon conviction, be punished, etc.

Rhett & Jones and Wells, Taylor & Taylor, for the plaintiff in error.

The attorney general and J. C. Helm, for the people.

³³ **CAMPBELL, J.** This prosecution, instituted by the Humane Society, before a justice of the peace of El Paso county, where the plaintiff in error (defendant below) was found guilty and sentenced to pay a fine, resulted in a conviction and a fine in the county court of that county in the trial upon defendant's appeal. To this latter judgment the defendant prosecutes his writ of error in this court.

In the county court, by an agreement of parties, the cause was submitted to the decision of the court, without a jury, upon this agreed statement of facts:

"The defendant was at the time of the matter complained of in this case a member of what is known as the 'Country Club,' the same being an organization of gentlemen, for the purpose of amusement, and its operations were carried on in El Paso county, Colorado.

"That on or about the twelfth day of January, 1895, the defendant, together with other members of said club, owned forty (40) live doves, which they had obtained and kept in confinement for the purpose of using them as targets to shoot ³⁴ at for their amusement; that at said time the doves were placed in traps singly and released therefrom, and then and there shot by the defendant as targets, for sport and amusement of himself and other members of the club; that some of the doves were shot and

killed outright by defendant, while some were wounded and then captured and immediately killed by persons employed for that purpose; others shot at by defendant escaped apparently unhurt; it was impossible to know whether all were unhurt or not, or whether they were seriously injured or not; that the wounding of said doves was not for the purpose of inflicting pain or to torture the same thereby, but resulted from want of skill, the purpose of the defendant being then and there to kill the birds outright; that the doves which were killed outright or wounded, and then captured and killed, were subsequently used as food by defendant and others."

The validity of the judgment below depends upon the construction of the following provisions of our statute:

"Every person who . . . tortures, torments, . . . or needlessly mutilates or kills . . . any animal, or causes or procures it to be done, . . . shall, upon conviction, be punished," etc: Mills' Annotated Statutes, sec. 104.

"In this act the word 'animal' shall be held to include every living dumb creature; the words 'torture,' 'torment,' and 'cruelty' shall be held to include every act, omission, or neglect whereby unnecessary or unjustifiable pain or suffering is caused, permitted, or allowed to continue when there is a reasonable remedy or relief": Mills' Annotated Statutes, sec. 117.

While this controversy is real, and the prosecution was instituted by the Humane Society in good faith, counsel for the people and the defendant, both in the court below and here, with the sole desire to obtain a decision upon the legal proposition involved, have, with commendable accord, eliminated all matters the consideration of which might tend to embarrass or obscure the one vital question in the case. It is proper further to remark that the plaintiff in error is not ³⁵ chargeable with moral delinquency, or with malicious intent wantonly to violate a law of the land; but, rather, as a law-abiding citizen, he has purposely done the act complained of in order to furnish a test case wherein may be determined his controverted right, and that of his associates, to shoot live birds from a trap for sport and amusement.

At the common law, the act done would not be a crime or a misdemeanor. If it is such now, it is because of our statute. As an abstract question, men of equal refinement and intelligence, either because of a difference in taste or training, or in their surroundings and occupations, might well differ as to the moral

obliquity of the act of shooting live doves as they were released from a trap. The scholarly ascetic, whose chief pleasures are found in the library, or the man whose life is devoted to the welfare of the lower animals, might suffer excruciating pain if such an act was committed in his presence; while the sportsman, whose recreations are gunning and fishing, might look with pleasure upon what, to him, was "an ancient and honorable pastime."

What is a popular diversion, or a harmless amusement, cannot always be accurately determined. That which was so considered in the decade past may not be so regarded to-day, and that which is so to-day may be tabooed, as such, in the near future; and so men equally conscientious, intelligent, and law-abiding may, not only at different times, but during the same period of time, differ as to these questions.

It is of common knowledge that within the past few years, as incident to the progress of civilization, and as the direct outgrowth of that tender solicitude for the brute creation which keeps pace with man's increased knowledge of their life and habits, laws, such as the one under consideration, have been enacted by the various states having the common object of protecting these dumb creatures from ill-treatment by man. Their aim is not only to protect these animals, but to conserve public morals, both of which are undoubtedly proper subjects of legislation. With these general objects all right-minded people sympathize. There may be, however, and are, ³⁶ radical differences of opinion as to the extent to which such legislation ought to go.

With the policy or wisdom of such enactments we have nothing to do. Our duty, and our only concern, is to give proper effect to such legislation, and to interpret or construe its provisions in the light of the object which the general assembly had in view when the law was passed in response to the demand of an enlightened public sentiment. We have been much aided by the learned counsel in their briefs and by their oral arguments, and by the authorities which their research has discovered. The cases in point are *Commonwealth v. Lewis*, 140 Pa. St. 261; *State v. Bogardus*, 4 Mo. App. 215; *Commonwealth v. Turner*, 145 Mass. 296; *State v. Porter*, 112 N. C. 887. Other authorities bearing upon this statute are *Ford v. Wiley*, L. R. 23 Q. B. Div. 203; *Grise v. State*, 37 Ark. 456; *Hodge v. State*, 11 Lea, 528; 47 Am. Rep. 307.

The Pennsylvania statute (Pa. Laws 1869, p. 22) is: "Any person who shall . . . wantonly or cruelly illtreat . . . any

animal," shall be punished. The Missouri statute (Laws 1874, p. 112) is: "If any person shall . . . torture, torment, . . . needlessly mutilate or kill . . . any living creature, he shall be punished," etc. The Massachusetts statute (Pub. Stats., c. 207, sec. 53) is: "Every owner . . . or person having charge or custody of an animal who . . . knowingly and willfully authorizes or permits it to be subjected to unnecessary torture, suffering, or cruelty of any kind, shall be punished," etc. The North Carolina Code, section 2482, is: "If any person shall willfully . . . torture, torment, . . . or needlessly mutilate or kill . . . any . . . animal," etc.

In the case before the Pennsylvania court, the special verdict of the jury was that the defendant was a member of a gun club which held pigeon shooting matches for a test of skill of marksmanship. At one of these matches, for said purpose, the defendant with a gun fired upon pigeons liberated from a trap, and killed one and wounded another. The ³⁷ wounded bird alighted upon a tree, when it was soon killed by a member of the club, according to the prevailing custom, and the two pigeons thus killed were then sold for food, as the rule of the club provided. Upon these facts the court held that the case was not within the statute. The object of the defendant being to acquire skill and perfect himself in shooting on the wing, the fact that in such exercise he wounded, but did not kill, one of the birds, was held not to constitute the act an unlawful, wanton, or cruel shooting or wounding. The learned chief justice who wrote the opinion concludes by saying: "We do not say there might not be a violation of the act at a shooting match, but, in our view, the facts found by the jury do not bring this case within it."

So far as we are advised, the Missouri statute has not been before the supreme court of that state, but in the case cited *supra* the St. Louis court of appeals has passed upon it. The facts were that as a man threw up pigeons, two at a time, the defendant shot and killed them in the air with a gun, to show his skill, and the pigeons so killed were eaten as food. The court, speaking by Hayden, J., held that the pigeons were not "needlessly or unnecessarily" killed, but that the killing, done in the indulgence of a healthful recreation and during "an exercise tending to promote strength, bodily agility, and courage," cannot be considered as a violation of the statute. The court refers to and emphasizes the fact that there was "no mutilation or anything approaching to it." What would have been the decision of the court had there been in that case, as there was here, a wounding

and mutilating of a number of the birds, we can only conjecture. Upon a rehearing, Lewis, P. J., said that the test of judicial interpretation of the statute was what application of the descriptive words employed was intended by the legislature. While the learned judge found no moral justification for the acts charged in the general truth that the policy of a good government was not to suppress innocent manly exercise, nevertheless he could not believe that it was within the legislative contemplation by an indefinite prohibition to interfere with ^{ss} pigeon shooting from traps, which, for so long a time, had been identified with a mere popular diversion that was not considered needless. These are the only cases cited by plaintiff in error which support his construction of our statute.

It will be observed that the Pennsylvania statute is not so broad as ours, and contains no prohibition against needlessly mutilating or torturing, as does our statute, and is aimed only at wanton and cruel ill-treatment. Had it, in these particulars, contained provisions like or similar to ours, and had the facts been the same as in the case at bar, the court might have considered the statute violated.

The Missouri statute in its specific inhibitions is very much like ours—substantially the same—and were the facts of *State v. Bogardus*, 4 Mo. App. 215, and the one under consideration the same, the former would be on all fours with this, and a precedent precisely in point; but as there was no mutilation of the pigeons, as in the case at bar, we are justified in the inference that the decision might have been different, as the court called special attention to the fact that there was nothing approaching to a mutilation of the birds.

In *Commonwealth v. Turner*, 145 Mass. 296, the defendant had charge of a fox, and permitted it to be turned loose to be hunted by dogs which pursued, caught, and mangled the fox. This was held to be a violation of the statute, and against public morals, which the statute sought to protect. The reasoning of the court is instructive, and, as it seems to us, conclusive. At the common law, fox hunting and shooting pigeons from a trap were equally lawful, and if fox hunting, in the circumstances stated, is prohibited, so, too, is shooting at captive pigeons liberated from a trap.

In the North Carolina case, the facts were identical with the facts in this. Indeed, the agreed statement of facts in this record seems to have been copied literally from the special verdict in

that case, with such changes only as were necessary as to the name of the club and the county, and using the word "doves" in this statement instead of "pigeons" in the special verdict. The North Carolina statute, ³⁹ unlike the others quoted, contains the same definition of "torture," "torment," and "cruelty" as does our statute, and the decision there was that the statute was violated.

The holding of the Massachusetts and North Carolina courts is, in our judgment, not only warranted under their respective statutes, but is in harmony with the advance in enlightened public opinion at this day as to the protection of dumb animals, which, we think, was unquestionably within the contemplation of the legislative mind at the time of the enactment of our statute. Indeed, it would seem that the language of our statute is too plain for construction.

In the North Carolina statute, like ours, the words "torment," "torture," and "cruelty" include every act whereby unnecessary or unjustifiable pain or suffering is caused. The shooting of wild animals in the forest and fishing in the streams do not come within the statute. We have other laws covering these things, and they are permitted at certain seasons of the year. Every act that causes pain and suffering to animals is not prohibited. Where the end or object in view is reasonable and adequate, the act resulting in pain is, in the sense of the statute, necessary or justifiable, as where a surgical operation is performed to save life, or where the act is done to protect life or property, or to minister to some of the necessities of man. But the killing of captive doves, as they are released from a trap, merely to improve one's skill of marksmanship, or for sport and amusement, though there is no specific intention to inflict pain or torture, is, within the meaning of this act, unnecessary and unjustifiable. The same degree of skill may otherwise be readily acquired, and so there was no necessity for the shooting of these doves. Other rational sport and amusement are within easy access of the gentlemen of the Country Club, and so the avowed object of this shooting is neither adequate nor reasonable; hence, under this act, unjustifiable.

Where, as here, the acts charged are admittedly done, not to furnish food, but merely for the sport and amusement of the defendant and his associates, the facts clearly bring the ⁴⁰ case within the ban of the statute. In contemplation of this law, the pain and suffering caused by such acts are disproportionate to

the end sought to be attained, and furnish no adequate or reasonable excuse for the acts which, to be necessary or justifiable, must be prompted by a worthy motive and a reasonable object.

The judgment, for the reasons given, is affirmed.

ANIMALS—CRUELTY TO—STATUTES IN REGARD TO.—Trapping a trespassing and depredating dog is not "needlessly torturing or mutilating," within a statute against cruelty to animals: *Hodge v. State*, 11 Lea, 528; 47 Am. Rep. 307, and note. See, also, extended note to *State v. Beekman*, 72 Am. Dec. 354.

SCHWED v. HARTWITZ.

[28 COLORADO, 187.]

EJECTMENT, STATUTE GIVING A RIGHT TO NEW TRIAL ON PAYMENT OF COSTS.—Under a statute declaring that whenever judgment shall be rendered against either party to an action of ejectment, it shall be lawful for him, before the first day of the next term, to pay the costs recovered by his adversary and to have the judgment vacated, but that neither party shall have more than one new trial as of right, if the defendant recovers judgment and the plaintiff pays the cost and procures a new trial, and the defendant recovers judgment in his favor, the defendant is then entitled, on payment of the costs of the last judgment, to have a new trial. In other words, each of the parties, if unsuccessful, has a right to a new trial on the payment of costs.

TAX SALES—SUNDAY PAPER, NOTICE PUBLISHED IN. A publication of a notice of a tax sale is in the nature of the service of process, and, if it takes place in a Sunday edition of a newspaper, is void.

Ejectment to recover possession of a lot of land situate in the city of Leadville. The first trial resulted in a judgment for the defendant. This was subsequently set aside, and a new trial granted to the plaintiff on payment of the costs. The second trial resulted in his favor, and a new trial was then granted to the defendants. The third trial resulted in their favor, and the plaintiff appealed. The statute in question allowing new trials as of right in actions of this character is as follows: "Sec. 272. Whenever judgment shall be rendered against either party, under the provisions of this chapter, it shall be lawful for the party against whom such judgment is rendered, his heirs, or assigns, at any time before the first day of the next succeeding term, to pay all costs recovered thereby, and upon application of the party against whom the same was rendered, his heirs, or assigns, the court shall vacate such judgment and grant a new trial in such case, but neither party shall have but one trial in any case, as of

right without showing cause. And after such judgment is vacated, the cause shall stand for trial, the same as though it had never been tried."

A. W. Stone, for the appellant.

A. J. Sterling, for the appellees.

Baldwin & Gunnell, amici curiae.

¹⁸⁸ HAYT, C. J. After the second trial, and before the third, plaintiff moved for a writ of restitution upon the following grounds: 1. Because a new trial was granted upon the payment by the defendants of the costs of the second trial only; 2. One new trial having been granted under the statute, the court was without power to grant another.

The first assignment of error is based upon the denial of the foregoing motion. The construction placed by the court upon the statute, as it then existed, was clearly right. It read: "Whenever judgment shall be rendered against either party, . . . the court shall vacate said judgment, and grant a new trial in such case, but neither party shall have but one new trial in any case, as of right."

This language clearly shows that it was intended to give plaintiff and defendant each, if unsuccessful, a right to one new trial upon the payment of costs. This construction is in harmony with the liberal rule adopted by the courts with reference to trials of title to real property, as well as in obedience to the plain intent of the code provision. Since this action was appealed, the code has been changed in this ¹⁸⁹ respect, so that now the first unsuccessful party is alone entitled to a new trial, as of course.

The order allowing the defendants a new trial upon payment only of the costs which had accrued after the first trial was free from error. The statute makes the payment of costs a condition precedent to the right to a new trial, as of course. It is the penalty exacted for such new trial. The first judgment was for the defendants, and when the plaintiff paid the costs and took a new trial, that was the end of that particular transaction. The costs so paid were not costs that could thereafter be recovered upon final judgment, and appellant has no just cause of complaint because a new trial was subsequently granted appellees without their refunding the amount so previously paid.

Plaintiff, to support her title, relied upon a certain tax sale. The notice of this tax sale was published only in the Sunday

edition of the "Herald-Democrat," a daily newspaper published in the city of Leadville. The statute provides that: "The treasurer shall give notice of the sale of real property by the publication thereof once a week for not less than four weeks, in a newspaper published in his county, if there be one; . . . and if there be no newspaper published in the county, the like notice shall be given by posting one written notice the above length of time in each election precinct, in which any land to be sold is situate, and one on or near the door of the treasurer's office, as above provided."

The district court decided that the publication in a Sunday edition only was not legal notice, and that all proceedings thereunder were without force or effect. The publication of the notice of a tax sale is in the nature of the service of process. It will not be contended that outside of a few cases, especially provided for by statute, service of process on Sunday in a civil action would be valid in this state, and the rule that tax sales are invalid, if made upon a notice published only in a Sunday paper, is too well settled to be now open to controversy. If, for any reason, a change is now ¹⁹⁰ desirable, the argument for such change should be made to the legislative department, and not to the courts: *Scammon v. Chicago*, 40 Ill. 146; *Black on Tax Titles*, 2d ed., sec. 210; *Blackwell on Tax Titles*, 5th ed., sec. 440; *Ormsby v. Louisville*, 79 Ky. 199; *Sawyer v. Cargile*, 72 Ga. 290.

The only decision we have been able to find apparently to the contrary is in *Hastings v. Columbus*, 42 Ohio St. 585, where it is held that the publication of certain ordinances with respect to street improvements, in a paper published only on Sunday, is sufficient; but this decision is based upon a statute of Ohio, which provides that a summons may be served "at any time." The court says that under this provision a service, whether personal or by publication, upon Sunday, is valid.

In this state, as a general rule, personal service cannot be made on Sunday; hence the entire reasoning upon the Ohio law is in favor of the conclusion reached by the district court.

Affirmed.

PROCESS—SERVICE OF, BY PUBLICATION—ESSENTIALS OF—SUNDAY.—A daily publication, newspaper, or journal, having a large general circulation and devoted to the general dissemination of legal news, and containing other matter of general interest to the public, is a newspaper of general circulation for the purpose of service of notice by publication: *Lynn v. Allen*, 145 Ind. 584; 57 Am.

St. Rep. 223, and note. See, also, *Pentzel v. Squire*, 161 Ill. 346; 52 Am. St. Rep. 378, and note. The publication of a sheriff's notice of sale in a Sunday newspaper is invalid: *Shaw v. Williams*, 87 Ind. 158; 44 Am. Rep. 756. See note to *Coleman v. Henderson*, 12 Am. Dec. 290, as to judicial acts on Sunday.

CRISMAN v. JOHNSON.

[23 COLORADO, 264.]

TAX SALES MADE AT AN UNAUTHORIZED PLACE.—If it appears by a tax deed that the sale took place at the office of the county clerk when the statute requires it to be at the office of the county treasurer, such deed is void.

TAX DEEDS, WHEN NOT VOID AS SHOWING SALES EN MASSE OF NONCONTIGUOUS LOTS.—If a tax deed recites the sale of a number of lots not numbered consecutively, this is not sufficient to overcome the presumption in favor of the deed and the regularity of the proceedings, for, notwithstanding the mode of numbering, the lots may be contiguous and their sale altogether authorized.

TAX SALES EN MASSE.—A tax sale and deed may include several distinct lots assessed to the same person and adjoining one another.

TAX SALES, OBJECTIONS WHICH MAY BE REMOVED BY STATUTE.—All questions with reference to tax proceedings, except such as go to the power and jurisdiction of the taxing officers and the fraud and misconduct of the parties, may be barred by statute, as where the statute makes tax deeds conclusive evidence of the regularity of the proceedings.

TAX DEED.—A NOTICE OF SALE IS NOT INDISPENSABLE to the exercise of the power to sell land for delinquent taxes, and the legislature may, therefore, provide that the omission to give such notice shall not affect the validity of the sale.

TAX DEEDS—STATUTES LIMITING TIME WITHIN WHICH TO ASSAIL.—A statute providing that no action for the recovery of land sold for taxes shall lie unless the same be brought within five years after the execution and delivery of the deed therefor is constitutional, and prevents the recovery of lands held by the defendant under a tax deed, on the ground that there was no notice of sale and that the lands were improperly sold en masse.

The plaintiffs claimed title to the land in controversy under patents from the government, and the defendants under certain tax sales and deeds. The sale and deed to Crisman embraced twenty-seven lots and that to Heinrich one hundred and seventy-nine lots, all of which were described as a part of the Cottage Hill Land Company's addition to Cottage Hill in Arapahoe county, Colorado. The statutes relied upon in connection with the tax sales and deeds were substantially as follows, according to Mills' Annotated Statutes. By section 3790, it was provided that every person owning or having charge of property subject to taxation should deliver a correct list thereof to the assessor,

and that no failure of the owner to have the property assessed or to have errors in the assessment corrected, and that no irregularity, error, or omission in the assessment or in the levying of the tax, should affect the legality of the tax levy or the title to real property which should accrue to any person holding under or by virtue of a deed executed by the treasurer, as provided for by law. Section 3902 provided for the mode of the execution and acknowledgment of tax deeds by the treasurer, and that when they were thus executed, and recorded in the proper office, such deeds should vest in the purchasers all the right, title, and estate of the former owner, and should be prima facie evidence: 1. That the real property conveyed was subject to taxation for the year or years stated in the deed; 2. That the taxes were not paid at any time before the sale; 3. That the real property conveyed had not been redeemed from the sale at the date of the deed; 4. That the property had been listed and assessed at the time and in the manner required by law; 5. That the taxes were levied according to law; 6. That the property was advertised for sale in the manner and for the length of time required by law; 7. That the property was sold for taxes as stated in the deed; 8. That the grantee named in the deed was the purchaser, or the heir at law, or the assignee of such purchaser; 9. That the sale was conducted in the manner required by law. Section 3904 declared that no action for the recovery of land sold for taxes should lie unless brought within five years after the execution and delivery of the deed therefor, giving, however, a further time for redemption in case the persons redeeming were minors, insane, or otherwise under disability. The trial court held the tax deeds void, and entered judgment for plaintiff, making no provision for the repayment to defendants of the taxes paid by them.

Rogers & Shafroth, for the appellants.

Edward L. Johnson, for the appellees.

207 HAYT, C. J. Are the tax deeds relied upon by the defendants void upon their face? It is admitted that the sale in the Heinrich case was made at the place fixed by the statute, but it is claimed that the sale in the Crisman case was not so made. Both sales were made at the office of the county clerk and recorder of Arapahoe county, this being the county wherein the property is situate, but after the sale in the Heinrich case, and before the sale in the Crisman case, the following statute

was passed: "On or before the first Monday in June in each year the treasurer is directed to offer at public sale, at his [the treasurer's] office, in his county, all lands on which the taxes levied the preceding year, or any preceding year, still remain unpaid; but such sale shall not be void if not made until after the day named": Gen. Laws 1877, sec. 2307.

The only authority by which an officer may levy and sell property for the nonpayment of taxes is such as is conferred upon him by statute. The officer has no title to the property, and the title which the purchaser procures is, therefore, dependent upon a compliance with the statutory direction or authority, unless this be waived. While there are certain provisions of the statute which are conceded to be directory, others are mandatory, and, where provisions are enacted for the protection of the rights of the owner, these proceedings are mandatory, and should be strictly followed. Among the latter provisions are those designating the place of sale.

²⁶⁸ It appearing upon the face of the Crisman deed that the sale was held at a place other than that designated by the statute, the district court properly treated the deed as void, as the officer was without jurisdiction to sell at such place; and the statute of limitations relied upon in this case cannot avail a party holding under such a deed: *Blackwell on Tax Titles*, 5th ed., sec. 501; *Gomer v. Chaffee*, 6 Colo. 314.

While the judgment of the district court in these respects must be upheld, that court should have made provision for the recovery of the taxes paid upon the property by the defendant, and for failure to do so, the judgment must be reversed: *Knowles v. Martin*, 20 Colo. 393.

Although the objection which we have found fatal to the Crisman deed does not apply to the sale in the *Heinrich* case, many other objections are urged which merit consideration. It is contended that the tax deed in this case is void, because, as it is claimed, it recites a sale of a large number of noncontiguous lots en masse.

This claim is based principally upon the recital in the deed of a sale of a large number of lots, not numbered consecutively. This is undoubtedly some evidence that the lots are not contiguous, but we think it is not sufficient evidence to overcome the presumptions in favor of the validity of the deed, and the regularity of the proceedings, and particularly of the recitals that the lots were exposed to public sale in substantial conformity

with the statute in such case made and provided. It is true this latter statement is the statement of a conclusion of law, but the deed follows closely the language of the statute in this respect, and the statement, having the sanction of legislative authority, should be given weight by the court. The statute permits the assessment of several adjoining lots if returned by the same person, and does not prohibit the sale in such instances of a number of lots together. It is directed against joining not contiguous lots or tracts of land in one sale; hence, the authorities which have been cited from states having statutory provisions unlike those of Colorado are not controlling here: Revenue Act of 1870, sec. 37; Mills' Annotated ²⁶⁹ Statutes, sec. 3822; Mills' Annotated Statutes, sec. 3894. It is not impossible for lots numbered as those in this deed to be contiguous, although the numbers do not run consecutively. It is quite possible that the lots may lie in a body together, notwithstanding such numbers, and we are, therefore, of the opinion that the deed is not, for this reason, void upon its face. A somewhat similar question was presented to the supreme court of Kansas, in *Cartwright v. McFadden*, 24 Kan. 662. There, as here, a number of lots were included in one deed, the only essential difference being that the lots in that case were designated by odd numbers consecutively, viz., 431, 433, 435, etc., while here this regularity of numbers does not exist. In reference to this recital, the court says: "This kind of evidence might sometimes, along with other circumstances, furnish the foundation for a finding that the lots are not contiguous; but alone, and against the statutory presumptions in favor of the regularity and validity of the tax deed, and of all the prior proceedings, it cannot sufficiently prove any such fact." We think the reasoning in that case applicable here, the facts in both cases being that the lots were not consecutively numbered, although the uniformity in the numbers there is not to be found in this case, but we deem this difference of no importance, it being once conceded that the fact that the lots are not numbered consecutively in a tax deed does not render the instrument void.

Having determined that the deed to Heinrich is not void upon its face, we may next consider other alleged irregularities intervening in the proceedings, together with the statute of limitations relied upon by plaintiff in error. The curative statutes of this state with reference to the listing and sale of property are sweeping in scope and far-reaching in effect. Section 3902 of

Mills' Annotated Statutes provides, among other things, that when a tax deed is regularly executed, it shall be prima facie evidence of certain enumerated facts.

It is contended, however, in this case, that while a tax deed is prima facie evidence of every fact enumerated by statute, as to all other essential matters the evidence must be supplied ²⁷⁰ before the deed can be received in evidence. Should we admit the correctness of this contention as a legal proposition, an examination of the statute discloses that it embraces every fact necessary to show a valid assessment and sale of the property, particularly when considered in connection with section 2261 of the General Laws of 1877: *Waddingham v. Dickson*, 17 Colo. 223.

The deed to Crisman purports to convey twenty-seven lots, and the deed to Heinrich one hundred and seventy-nine lots, all in Cottage Hill Land Company's addition to Cottage hill. It is said that a tax deed cannot convey more than one tract or lot. Of this contention it is to be observed that such a requirement would be of no benefit to the owner who is so unfortunate as to have his property sold for taxes, nor to the purchaser at a tax sale. In these cases, instead of two deeds being sufficient, it would necessitate two hundred and six separate instruments. This would involve hundreds of dollars of additional expense for execution and recording, with no possible benefit resulting to any party in interest therefrom. This point was raised in *Waddingham v. Dickson*, 17 Colo. 223, and held to be untenable. Although in that case section 2331 of the laws of 1877 is not alluded to in the opinion, an examination of this statute discloses nothing that militates against the conclusions there reached, the object of the section being to make it a duty of the treasurer to issue a deed to the purchaser after the expiration of three years from the date of sale, and not to specify the number of lots or parcels of land that may lawfully be included in any such deed.

Among other defects or irregularities urged to the tax proceedings, are the following: Insufficiency of notice of sale; no record shown of meeting of board of equalization; no evidence that the assessor swore to the assessment roll; assignment not of record; qualification of assessor not shown; no record of a meeting of either the state or county board of equalization.

²⁷¹ It will, of course, be admitted that there are some objections against tax titles that cannot be obviated by statute, as the effect would be to deprive the owner of property without due

process of law. Among illustrations of defects of this nature may be enumerated instances where the property sold was not within the jurisdiction of the tax district, or that the sale, in fact, never took place; but, as a general rule, all questions with reference to tax proceedings, except such as go to the power and jurisdiction of the taxing officers, or the fraud and misconduct of the parties, are barred by the statute: Black on Tax Titles, sec. 284.

Of the objections urged in this case, the failure to advertise the proper length of time prior to sale is the most serious, and if this must fail because not taken advantage of before the special statute of limitations had run, a fortiori must all others be overruled. Assuming, but not deciding, that the tax sale was not advertised for a sufficient length of time, prior to the sale, we think the statute was designed to cover just such cases. The claimant could have brought suit to set aside the invalid sale at any time before the statute had run, but by failure to do so he has waived his right to attack the sale for this reason. In other words, the lapse of time has made the sale unassailable. This has been expressly held in a number of cases. The statute under consideration, in the case of *Allen v. Armstrong*, 16 Iowa, 508, made the tax deed conclusive evidence of due notice of sale, among other things, and the court held that such notice of sale is not essential to the exercise of the taxing power. The legislature might provide for the sale of delinquent taxes upon any day, without requiring any notice whatever, and hence it was competent for the legislature to provide that the omission to give notice should not affect the validity of the sale. The opinion in that case is by Judge Dillon, and was followed in the subsequent case of *Hurley v. Powell*, 31 Iowa, 64.

A statute of Minnesota provided that in foreclosure sales "no such sale shall be held invalid or set aside by reason of any defect in the notice thereof, or in the publication and ²⁷² posting of such notice, . . . unless the action . . . be commenced within five years after the date of such sale," and the court held that the power of the legislature to pass such a statute could not be questioned, provided only that a reasonable time was allowed after its enactment in which to bring suits as to previous foreclosures; and, also, that the act applies when there has not been a publication for the full time prescribed by statute, and bars a recovery because of a defective notice. The action in that case was in ejectment, brought by one claiming under the mortga-

gor, by conveyance executed subsequent to the mortgage: Russell v. Akley Lumber Co., 45 Minn. 376. See, also, Mogan v. Carter, 54 Minn. 141.

The statute of this state provides that no action for the recovery of lands sold for taxes shall lie, unless the same be brought within five years after the execution and delivery of the deed therefor by the treasurer, any law to the contrary notwithstanding. As we have already stated, this provision is sweeping in its terms. It is not claimed to be in contravention of any constitutional provision, and it is the duty of the court to give it effect according to the plain intent and letter of the act. By another statute the deed, when recorded, is made prima facie evidence of title; so that when this deed was placed upon record, plaintiff's cause of action accrued, and the statute of limitations then commenced to run. When our revenue laws are all considered, this construction is neither harsh nor unreasonable, but necessary for the protection of purchasers at tax sales, and to secure the collection of the public revenue. Under the revenue act a considerable time must elapse between the assessment and sale. After sale, a certificate of purchase is issued to the purchaser, and three years must intervene thereafter before a tax deed can issue, and then for the first time does the five year statute of limitations commence to run, thereby giving upward of eight years during which the owner may question the invalidity of the tax proceeding, without meeting with the bar of this statute. The liberal time given, no ²⁷³ doubt, was deemed sufficient by the legislature to enable the owner to fully protect his interests, and, if he failed to move during all these years, it was deemed but reasonable that he could not thereafter be heard to complain.

It is seldom that a case is presented to the court showing such gross negligence on the part of the owner of property in the payment of taxes as in this case. The purchaser paid the taxes for 1875, and only became entitled to the tax deed upon payment of the taxes of 1876, 1877, and 1878. During these three years the right of redemption existed, with no attempt at its exercise. The treasurer's deed was executed and recorded in 1879, and for four years thereafter the grantee paid all taxes assessed against the property without protest on the part of the original owner. In 1881, the owner executed a quitclaim deed to all interest in the property, but it was not until the tax of 1883 became due, and at a time when the purchaser's title by the payment of an-

other year's taxes would have become absolute under another statute, that the grantee attempted to pay any taxes upon this property. Even then he did not move to set aside the previous sale, or offer to refund the taxes paid by plaintiff, but allowed the matter to rest for more than a year before instituting suit. In these circumstances, the plaintiff is not entitled to again resume title to his property: *Waddingham v. Dickson*, 17 Colo. 223; *Morris v. St. Louis Nat. Bank*, 17 Colo. 231; *De Foresta v. Gast*, 20 Colo. 307; *Knowles v. Martin*, 20 Colo. 393.

The judgments must be reversed, and the causes remanded for further proceedings, in accordance with this opinion.

TAXES—TAX DEEDS AS EVIDENCE.—The legislature has the power to make tax deeds conclusive evidence of compliance with all the requirements of the law which are merely directory and which pertain to the regulation of the manner of exercising the taxing power, and which requirements it might, in the exercise of its discretion, dispense with entirely: *Larson v. Dickey*, 89 Neb. 463; 42 Am. St. Rep. 595, and note. See, also, *Miller v. Miller*, 98 Cal. 876; 31 Am. St. Rep. 229.

TAXES—TAX SALES EN MASSE.—Where different sections, severally assessed, are sold in a body for the sum of the taxes due upon all, the sale and tax deed thereunder are absolutely void: *Cocks v. Simmons*, 53 Ark. 104; 29 Am. St. Rep. 28. See, also, *Macdonough v. Elam*, 1 La. 489; 20 Am. Dec. 284; *Jones v. Gibson*, N. C. Term. Rep. 41; 7 Am. Dec. 690.

TAXES—TAX SALES—NOTICE—PRESUMPTION OF.—It will be presumed that notice of the expiration of the time for redemption was properly served when a tax deed has issued, and the statute makes it prima facie evidence of the regularity of all proceedings prior to its execution: *Soukup v. Union Investment Co.*, 84 Iowa, 448; 35 Am. St. Rep. 317, and note. Contra, *Miller v. Miller*, 31 Am. St. Rep. 229, and note.

TAXES—TAX SALES AT UNAUTHORIZED PLACE.—When a tax sale is made within the courthouse, under a statute requiring that it shall take place "before the courthouse door" it is void and passes no title: *Rubey v. Huntsman*, 32 Mo. 501; 82 Am. Dec. 143, and note.

ON THE GENERAL SUBJECT OF TAX SALES, see extended note to *Magniar v. Henry*, 4 Am. St. Rep. 187-189, and note to *People v. Turner*, 15 Am. St. Rep. 508.

EMERSON v. SHANNON.

[23 COLORADO, 274.]

A TAX DEED OF SEPARATE, NONCONTIGUOUS TRACTS of land, sold en masse, is void.

TAX DEEDS—CLOUD UPON TITLE.—Where plaintiff, in an action to quiet title, deposits in court the moneys paid out under a void tax sale, he is entitled to have the cloud cast upon his title by such sale removed.

W. T. Rogers, for the plaintiff in error.

O. G. Hess and P. L. Hubbard, for the defendant in error.

274 HAYT, C. J. Action instituted by defendant in error, Shannon, as plaintiff, against plaintiff in error, Emerson, to remove cloud from title.

It is averred in the complaint that plaintiff has the legal and equitable title to, and is in the peaceable possession of, the southeast quarter of section 15, township 22 south, range 46 west, situate in Prowers county. It is alleged that the defendant sets up and claims an interest in the premises adverse to the estate and interest of plaintiff, with a prayer that he be required to show his title, to the end that it may be determined to be null and void as against the title of plaintiff.

275 To this complaint an answer was filed containing: 1. A general denial; 2. An averment of title in the defendant by reason of a purchase by him of the premises, at a tax sale held on the second day of June, 1890, for the delinquent taxes for the year 1889. The action was tried to the court, who found the issue of title for the plaintiff, but required him to pay all taxes which defendant had previously paid upon the property, with interest, costs, and penalties, amounting, altogether, to the sum of one hundred and twenty-three dollars and twenty-five cents. From this judgment the defendant brings the case here by writ of error.

The defendant, to maintain his title at the trial, offered in evidence a tax deed, purporting to convey lands sold for delinquent taxes en masse for a gross sum, viz: The northeast quarter (N. E. $\frac{1}{4}$); also, the northeast quarter (N. E. $\frac{1}{4}$) of the southeast quarter (S. E. $\frac{1}{4}$), southeast quarter (S. E. $\frac{1}{4}$) of the southeast quarter (S. E. $\frac{1}{4}$), southwest quarter (S. W. $\frac{1}{4}$) of the southeast quarter (S. E. $\frac{1}{4}$), and the northwest quarter (N. W. $\frac{1}{4}$) of the southeast quarter (S. E. $\frac{1}{4}$), all in section numbered fifteen (15), township numbered twenty-two (22) south, of range numbered forty-six

(46) west; the northwest quarter (N. W. $\frac{1}{4}$) of the northwest quarter (N. W. $\frac{1}{4}$), section numbered seven (7), township numbered twenty-three (23) south, of range numbered forty-six (46) west.

We have just held, in the case of *Crisman v. Johnson*, 23 Colo. 264, that under our statutes it is lawful for the authorities to assess and sell en masse, for delinquent taxes, a number of town lots. Section 3822 of Mills' Annotated Statutes provides for such assessment if the lots are listed by the same person, and section 3894 provides that "when . . . adjoining lots are offered as the property of the same person, one or more may be sold for the taxes of all."

It is not necessary to determine whether, when all our statutes on the subject are considered, it is permissible to sell for taxes several tracts of contiguous acre property, as such a case is not presented, as the description given of the several tracts in the treasurer's deed will only apply to lands that are not contiguous, ²⁷⁶ but widely separated and in different townships. It shows that these noncontiguous tracts were sold together for a gross sum. When this instrument was offered in evidence for the purpose of showing title in the defendant, the court properly rejected the same. The authorities are uniform that such a deed is absolutely void: *Black on Tax Titles*, sec. 122; *Hall v. Dodge*, 18 Kan. 279; *Byam v. Cook*, 21 Iowa, 392; *Farnham v. Jones*, 32 Minn. 7.

Upon the announcement of this ruling, the defendant withdrew the general denials of the answer, and the court thereupon entered judgment for plaintiff, removing the cloud created by the tax deed, upon condition that plaintiff pay all taxes theretofore paid by the defendant upon the property, together with interest, penalties, and costs, thereby fully protecting the rights of the defendant in the premises. The amount of such taxes, penalties, and costs was brought into court, and deposited for the use of the defendant, who refused to accept the same. He is still entitled to this money, but the plaintiff is entitled to have the cloud cast by the tax deed removed.

Affirmed.

TAX SALES EN MASSE are generally invalid and pass no title: See note to *Crisman v. Johnson*, ante, p. 224.

CLOUD ON TITLE—BILL TO REMOVE.—A bill to remove a cloud on title cannot be maintained unless the plaintiff has both the legal title and the possession: *Helden v. Hellen*, 80 Md. 616; 45 Am. St. Rep. 371, and extended note as to, who may maintain such a suit.

It is essential in a bill praying to be relieved against a mortgage, that plaintiff should offer to pay the amount of the debt, with interest and costs: *Beekman v. Frost*, 18 Johns, 544; 9 Am. Dec. 246.

KINDEL v. LE BERT.

[28 COLORADO, 385.]

RULES OF COURT.—JUDICIAL NOTICE cannot be taken by an appellate court of rules adopted by a trial court, and the party asserting the existence of a rule of such court, and that he has been prejudiced by its violation, should make it a part of the record on appeal.

TRIALS—EVIDENCE.—The order of proof is always within the discretion of the trial court, and will not be interfered with by the appellate court, unless there has been an abuse of discretion.

ELECTION CONTESTS—BALLOTS, REFUSAL TO RE-COUNT OR REOPEN, WHEN NOT ERRONEOUS.—In an election contest, the court may refuse to permit ballot-boxes to be opened and the ballots recounted for the purpose of being examined as to frauds alleged, unless some testimony is first offered tending to show such frauds.

ELECTION CONTESTS—AMENDMENTS.—Where the proceeding in an election contest is governed by a special statute, which does not provide for amendments, and in which the proceedings are not assimilated to some practice so providing, amendments of the contestant's pleadings cannot be permitted to set up a ground of contest not stated in the original pleadings.

ELECTION CONTESTS—PLEADINGS.—The general statement in an election contest that the defendant tampered with, or altered, the returns after they were received by him, though not denied, is too vague and general to support a motion for a judgment upon the pleadings. The mere statement that one is guilty of a fraud is not sufficient to call for denial. Besides, this statement is deficient in not alleging that the tampering with returns prejudiced the contestant or changed the result of the election.

PUBLIC OFFICERS—ELIGIBILITY TO RE-ELECTION.—The fact that an election statute makes it the duty of an officer to perform various acts in connection with the election, and gives him general control and supervision thereof, does not render him ineligible as a candidate to succeed himself.

PUBLIC OFFICERS, WHEN NOT RENDERED INELIGIBLE FOR RE-ELECTION.—A statute making the county clerk one of a board of three members to canvass and declare the result of an election is not void as an attempt on the part of the legislature to make one who is a candidate for re-election a judge in his own case. The powers conferred by statute are ministerial rather than judicial.

Election contest by George J. Kindel against Richard Le Bert. They were candidates for the office of county clerk of Arapahoe county, and the latter was declared elected by the canvassing board. The original statement of contest was filed November 30, 1895. It charged that legal votes cast in the different precincts in favor of the contestant had been improperly and fraudulently re-

jected, that illegal votes cast against him had been counted for his opponent, that the latter, by bribery, intimidation, and corruption, had received illegal votes that ought not to have been counted for him, and had prevented legal votes from being cast and counted for the contestant, and that the defendant had been guilty of various acts of fraud in the distribution of the ballot-boxes and ballots to various election precincts. The contestant further alleged that the defendant, being already county clerk at the time of the election, had performed certain acts in and about the election as such officer, but which, because the defendant was himself a candidate, were fraudulent and void. There was also a general allegation that the defendant had tampered with, and altered, the returns after they had been officially received by him. On February 18, 1896, the case was certified for trial to the district court of the second judicial district, and, on the 21st of February, the contestant claimed that the case had been improperly assigned to the judge of the second division, asked that it be sent to another division to which, he claimed, under the standing rules of the court, it ought to have been sent in the first instance. This request was denied, but the presiding judge transferred the cause to another division, where he decided it belonged. The contestant appeared before the judge in the latter division and again presented his application that the cause be assigned to the division which the contestant claimed had jurisdiction of it, and this application was denied. Afterward, the several judges of the district court agreed that none of them should hear the cause, and it was set for trial before the judge of the twelfth judicial district, who presided at the trial without further objection by the contestant. On the day fixed for the trial, the contestant asked leave to file an amended statement of his contest, in which he sought to set up causes of contest not in the original statement, and also to charge additional fraudulent acts of the same general nature as those specified in the original statement. Leave to file this amended statement was denied. At the trial the plaintiff asked permission to open the ballot-boxes and to inspect and count the ballots. The court, as a condition precedent to making an order for such inspection and counting, required the plaintiff to first introduce some evidence tending to establish the frauds alleged. The contestant refused to do so. The court then ruled that the ballot-boxes might be opened to ascertain from the ballots if any of the mistakes complained of had been committed. This offer was also declined

by the contestant, and he refused to offer any evidence. The court then decided against him on the face of the returns, and he appealed.

H. J. Hersey, H. B. O'Reilly, and E. F. Richardson, for the appellant.

Felker & Dayton, for the appellee.

³⁹⁰ CAMPBELL, J. Although the contestee does not concede the power of the county court to transfer this proceeding to the district court, or the jurisdiction of the district court to hear and determine this contest, he has not assigned for error the act of the former in certifying the cause to the latter, or the assumption by the latter of such jurisdiction. While jurisdiction of the subject matter cannot be conferred by waiver or consent of the parties, yet, as counsel have not discussed either of these points, we do not feel called upon, in the absence of full argument, to determine questions of such importance. We therefore proceed directly to a consideration of the errors assigned. This must not be taken either as an affirmance or disapproval of said respective rulings of the lower courts.

The errors specified are that the case was improperly assigned; that the court erred in refusing leave to file the amended statement, in refusing a recount of the ballots, and in denying contestor's motion for judgment upon the pleadings.

1. Except in the brief of counsel, we are not advised that there is a standing rule of the district court for the assignment of causes to the different divisions. If that is so, and it was violated by the district court, to entitle the party aggrieved to a review of the ruling complained of, it is indispensable that the rule be embodied somewhere in the transcript of the record, for rules prescribed by the district court for the regulation of its practice cannot be taken judicial ³⁹¹ notice of by this court, unless so provided by statute: *Scott v. Scott*, 17 Md. 78.

There is, however, a stronger reason than this why appellant cannot complain of this ruling. In passing upon an application for a writ of mandamus asked by contestor in this case, this court used this language: "The relator's right, however, is not the right to select a particular judge, but a right to reject a judge that is disqualified to try the case for any reason known to the law": *People v. Clerk, etc.*, 22 Colo. 280. Moreover, according to his own contention, the prejudice, if any, to the con-

testor, resulting from an improper assignment, consisted not in the fact that his case was transferred to one particular division of the court rather than to another, but that the judge presiding in the assigned division was objectionable, or the judge presiding over the division to which he wished the transfer made was less objectionable, or, in fact, favorable, to the applicant. It is clear, therefore, that when the contestor appeared below, and, without objection, went to trial before Judge Holbrook in that division where the cause was then pending, he waived any objections theretofore made by him to the assignment of the cause to that division.

2. The error predicated upon an alleged refusal of the court to order a recount of the ballots is not tenable. The facts upon which this assignment purports to be based are not in this record. It is true the contestor, before the introduction of any substantive testimony tending to establish the charges of fraud, asked the court to order the ballot-boxes to be opened that the ballots might be inspected. The court, however, expressly ruled that it would permit the ballot-boxes to be opened for the purpose of ascertaining whether any of the mistakes charged by the contestor had been committed, because, if any errors of computation were made, the ballots themselves would show that fact; but refused to allow them to be opened for an examination as to the frauds alleged until there had first been some testimony tending to establish such charges, and this latter ruling was, in part, based upon ³⁰² the ground that the ballots, without such other evidence, would not tend to prove the frauds. While, therefore, it is not a fair statement to say that the court altogether refused to allow the ballot-boxes to be opened, its qualified refusal to do so was entirely proper, and in accordance with the doctrine announced in *Clanton v. Ryan*, 14 Colo. 419. The order of proof is always discretionary with the trial court, and will not be interfered with by an appellate court except where there is abuse of that discretion. The reasonable requirement of the trial court that some evidence should first be introduced as to these charges of fraud before going to the expense of bringing in, from the different precincts of the county, the election judges with their keys to open the ballot-boxes, was not only within the legal discretion of the trial court, but commends itself to our judgment as a wise exercise of that discretion.

3. As to the right of an amendment to pleadings under statutes providing a special procedure for election contests, the au-

thorities are not harmonious. In the earlier cases in Pennsylvania it seems that the right to amend was denied, or sparingly exercised. In the later cases this rule in that jurisdiction is relaxed, and amendments as to matters of form, or such as are made to amend or complete causes of contest contemplated within the original statement, are allowed under the common-law power of the court to permit amendments: *Election Cases*, 65 Pa. St. 20.

In Illinois, proceedings in election contests, under the special statute, are held to be, to all intents and purposes, chancery proceedings, and the rule in equity permitting amendments is applied: *Dale v. Irwin*, 78 Ill. 170.

In *Heyfron v. Mahoney*, 9 Mont. 497, 18 Am. St. Rep. 757, an amendment correcting the spelling of the names of persons set forth in the original pleading, and one adding new names, were allowed, the court remarking that as to the former the trial court could have distinguished without the amendment, and as to the latter, it was not sufficient to control the judgment. The case, then, is authority only for the proposition that an ³⁰³ amendment as to form, or as to some matter attempted to be set up in the original pleading, can be made.

In the case of *Brown v. McCollum*, 76 Iowa, 479, 14 Am. St. Rep. 228, it was held that the plaintiff may make any amendment to his original statement that he thinks proper. This ruling was under the provisions of an act which expressly provided for amendments, and assimilated proceedings, as near as practicable, to the practice in civil actions. In terms, the court held that any amendment which the contestor might see fit to make was proper, and might contain an entirely new cause of action. From the language of the opinion, taken in connection with the fact that the nature of the amendment allowed is not shown, it is difficult to determine whether the court based the ruling upon the provisions of the Civil Code, or entirely upon the election statute. This is manifest, because, in a later case (*Randall v. Christianson*, 84 Iowa, 501), the same court declined to determine whether, under the provisions of their code, it was proper for the court to allow an amendment setting up a new cause of action. But the decision seems to be based upon the provisions of the election statute, which was interpreted as authorizing so radical an amendment.

In *McCrary on Elections*, section 396, it is said that an amendment in proper cases should be allowed. Where it is prop-

er, it should be seasonably applied for and under sufficient showing: *McCrary on Elections*, secs. 407, 408. And if it would work a continuance or a considerable delay, it should not be granted.

Upon the other hand, where, as in Colorado, the procedure is governed by a special act which does not provide for amendments, and in which the proceedings are not assimilated to some practice that does so provide, it has been expressly held that it was beyond the power of the court to permit amendments to be made: *Ford v. Wright*, 13 Minn. 518; *Bull v. Southwick*, 2 N. Mex. 321, 362, et seq; *Vigil v. Pradt*, 4 N. Mex. 375; 6 Am. & Eng. Ency. of Law, 407.

In the case of *Schwarz v. County Court*, 14 Colo. 44, because not necessary to the determination of that case, this ³⁹⁴ court expressly declined to decide the point. But as it held that the act furnished a complete system of procedure within itself, this case gives countenance to the doctrine that, in special proceedings, the right to amend depends upon the provisions of the act itself. Additional recognition is found in the decisions of this court under the eminent domain act, which prescribes a complete system of procedure for the taking or damaging of private property. Under that act it has been decided that the code provisions "on the subject of amendments to pleadings are inapplicable": *Knoth v. Barclay*, 8 Colo. 300; *Tripp v. Overocker*, 7 Colo. 72; *Colorado Cent. Ry. Co. v. Allen*, 13 Colo. 229, 242.

So far as our investigation has gone, it is only in the Iowa case, *supra* (if, indeed, that case goes to that length), where an amendment has been permitted setting up a new and distinct cause of action. In all of the other cases, the amendments were made for the purpose of correcting or perfecting statements in causes of action contained in the original pleading. Upon principle, and in the light of these authorities, we are of opinion that where the statute itself provides for amendments, but does not define their scope, those relating to formal matters, or which are made for the purpose of perfecting and completing causes of contest comprehended within the original statement, may, upon a proper showing and if applied for within a reasonable time, be permitted; but in the absence of such a permissive statute, not even amendments of this nature can be made, and, unless there is a provision expressly so providing, no new cause of action or contest can be set up by way of amendment.

At the common law, neither in an action at law nor in a suit in equity, could an amendment to a pleading of a party instituting the suit be made which introduced a new cause of action: Bliss on Code Pleading, 2d ed., sec. 429. The same practice prevails in the majority of the states which have adopted the reformed code of procedure: *Givens v. Wheeler*, 6 Colo. 149; *Union Pac. Ry. Co. v. Sternberg*, 13 Colo. 141; *Davis v. Johnson*, 4 Colo. App. 545.

³⁹⁵ In another view, the refusal of the district court to allow to be filed this amended statement was right, whether the provision of our code, the election act in question, or the common-law practice governs. This is apparent when we consider that the contestor altogether abandoned his original statement, though it well pleaded several causes of contest. He did not limit his request to amend causes of contest set up in the original statement, but asked permission to amend by introducing entirely new and distinct causes.

Even if the object of the amended statement was to perfect existing causes of contest, and the code provision applied, as contended by the contestor, the application was not accompanied by an affidavit with any sufficient showing why the amendment should be made, or why the original statement was not, in the first instance, sufficiently explicit: Code 1887, sec. 75. It is true that the amended statement was verified, and therein was an allegation in general terms to the effect that it could not have been sooner tendered; yet an inspection of the amended statement and the facts of the case as disclosed by the record abundantly negative this claim. In the original statement were a number of causes of contest well pleaded. If established by the proof, they would entitle contestor to a judgment. He waived his unquestioned right to proceed to trial upon the merits, and hinged his entire case upon the uncertain chance of obtaining a reversal of the ruling of the trial court denying an application to amend. This he did, well knowing that the probabilities were against him, for in a previous decision by this court (*Schwarz v. County Court*, 14 Colo. 44) doubt was inferentially cast upon the right of amendment; and in several decisions, *supra*, under the eminent domain act, involving precisely the same principle, the holding was that the code provision relating to amendments of pleadings was inapplicable.

4. The motion for judgment upon the pleadings is predicated upon the twenty-ninth cause of contest, which is not denied in

the answer. It is based upon two grounds: 1. That the contestee tampered with the returns as made to him by ³⁹⁶ the election board; and 2. That he was incapacitated to become a candidate for re-election.

As to the former, it is only necessary to say that every rational rule of pleading with which we are acquainted requires that the ultimate facts constituting fraud be set forth. The evidentiary facts should not be pleaded, but at least a general statement of the acts or words constituting the fraud must be alleged. A mere statement that one is guilty of fraud, which is all that this particular specification contains, is not sufficient to call for a denial: *Bennett v. Reef*, 16 Colo. 431; *Thomas v. Mackey*, 3 Colo. 390; *Burdsall v. Waggoner*, 4 Colo. 256; *Robinson v. Dolores etc. Canal Co.*, 2 Colo. App. 17; *Stimson v. Helps*, 9 Colo. 33; *Tucker v. Parks*, 7 Colo. 62, 71; *Mills' Annotated Code*, 111, notes 99, 100, p. 168, note 136, 176, and cases cited; *Bliss on Code Pleading*, 2d ed., sec. 211.

Besides this, there is no allegation in this specification that the tampering with the returns prejudiced the contestor, or changed the result of the election.

The second ground of the motion we now proceed to consider. That the election statute makes it the duty of the county clerk to prepare the registry of voters, to make up and print the ballots, to distribute the ballot-boxes and the ballots to the election boards, and gives him general control and supervision over elections, certainly does not disqualify him as a candidate to succeed himself. While not controlling, we know the facts to be that not only in our own state, from the beginning down to the present, but in many other states having similar statutes, it has been the custom for officers invested with similar powers to be candidates for re-election. No question, so far as we know, has been heretofore raised touching their qualification.

Whatever weight these considerations possess might properly be directed to the legislative branch of the government as a reason why it should expressly disqualify him as a candidate when it invests an official with such sweeping power. As applicable to the question before us, it is without merit.

But we apprehend that the real point of the argument is ³⁰⁷ that since section 1626 of *Mills' Annotated Statutes* (Gen. Stats. 1883, sec. 1202) makes the county clerk one of the board of three members to canvass and declare the result of the election, this is an attempt on the part of the legislature to make one who is

a candidate for re-election to the office of county clerk a judge in his own case, which it is beyond the power of the legislature to do. Or, to put it in another form: Since the statute invests the officer with judicial power to determine the result of an election, which, by the terms of the statute, he is bound to exercise, he thereby becomes incapacitated as a candidate for re-election. As a leading case we are cited to *Commonwealth v. McCloskey*, 2 Rawle, 369, found, also, in *Brightley's Election Cases*, 196. There it was held that one elected to the office of county supervisor could not be a judge of his own election. An examination of the case shows that the statute itself made the members of the board of supervisors judges of said election, gave them full power and authority to approve thereof, or set aside the same and order a new election, and invested them with power as ample and as clearly judicial as that which our act confers upon county courts. Properly, therefore, it was held that the act of McCloskey in assuming to pass upon and judge of his own election was void.

In the case of *Dimes v. Grand Junction Canal*, 3 H. L. Cas. *759, the decision was that the lord chancellor was disqualified from pronouncing a decree in a case while he was interested in a corporation which was one of the parties to the suit.

In the United States senate it was determined that a senator whose election was contested could not vote upon his right to the office: *Congressional Globe* 1865-66, p. 1635, et seq.

It will be observed that in all these and similar cases that might be cited the inhibited power exercised was clearly judicial. In the English case and in the Pennsylvania case the mere statement shows this. When we consider that, under the constitution of the United States, "each house ³⁹⁸ shall be the judge of the elections, returns, and qualifications of its own members," the fact is equally apparent. None of the cases cited are in point, either as to the nature of the powers conferred, or as to the eligibility of one holding such office as a candidate to succeed himself.

In the case before us, the power exercised by the canvassing board, of which contestee was one member, is purely ministerial, or, as has been otherwise expressed, mathematical. The only power conferred, and the only duty required, of the canvassing board in relation to the canvass, is to count the votes based upon the returns as made by the election judges, and to give certificates to those receiving a majority of the votes thus ascer-

tained. The canvassing board cannot go beyond or behind the returns, or reject votes, or otherwise inquire into the validity or conduct of the election. Upon the proposition that such duties are, in no sense, judicial, the authorities are uniform: *People v. County Commrs.*, 6 Colo. 202, 209; *People v. Kilduff*, 15 Ill. 492; 60 Am. Dec. 769; *People v. Head*, 25 Ill. 325; *People v. Hilliard*, 29 Ill. 413; *People v. Rives*, 27 Ill. 242; *County of Lawrence v. Schmaulhausen*, 123 Ill. 321.

Courts always approach the decision of election contests with more or less reluctance, for the bitterness frequently incident to election controversies is sometimes continued throughout the ensuing legal proceedings. While they would welcome a divestiture of their jurisdiction to review and determine political questions, so long as the law confers the power, imperative duty leaves no other alternative than to decide these controversies. In the case at bar, however, we are relieved of much of the embarrassment usually attending these contests, for had the conclusions reached by us upon the foregoing questions of practice been in favor of the contestor, still a judgment here in accordance with his contentions would not afford him any relief in this particular case. Since this appeal was lodged in this court, an event has occurred which renders ineffectual, as to contestor, any judgment that might be rendered in his favor. It seems that no sufficient provision for preserving these ballots as evidence was made, as might have been done at contestor's instance, and the ballot-boxes containing them were distributed to the election judges, and the ballots cast at the election in 1895 were, at the election in 1896, taken from the boxes and burned by the election judges just before the voting began. This is authorized by section 1646 of Mills' Annotated Statutes (Gen. Stats., sec. 1221). It is conceded by contestor that the destruction of these ballots has eliminated from the case all questions of fraud, and that even if, upon this appeal, there was a reversal, he would be obliged to abandon his contest in the court below, unless, indeed, the contestee was incapacitated to succeed himself, which proposition has been resolved against him by a previous decision of this court.

We may also add that, under the authority of *Mills v. Green*, 159 U. S. 651, we might properly have declined to pass upon any of the controverted questions, and dismissed the appeal because of the happening of the event which rendered action by this court a useless proceeding, so far as the contestor is con-

cerned. But considering the public interests involved, it has been deemed best to settle these questions in order that the legislature, now in session, may, if it see fit, provide a different procedure from that now existing. With the wisdom of the act concerning contested elections, we are not concerned. The evident object of the legislature was to provide a speedy and summary remedy. There are weighty arguments upon both sides of the proposition concerning amendments of pleadings. Every facility should be afforded to one alleging that the choice of the people has been corruptly thwarted, or unlawful impediments placed in the way of the voters, or that the result of an election, as declared, does not correctly express the will of the legal majority. It must be remembered, if the right to amend is given to the contestant, it should be given also to the contestee. The term of office of county officials is two years, and if as ⁴⁰⁰ liberal a rule in reference to amendments should be provided in these contests as obtains in civil actions under our code, the door would be opened wide for technical obstructions and delays, and it is conceivable that the term of office might, in some cases, nearly, if not quite, expire before the issues could be settled. Without reference, however, to legislative policy or the wisdom of the procedure provided, we have construed the law as we find it.

From the foregoing it follows that the judgment of the district court should be affirmed, and it is so ordered.

EVIDENCE—JUDICIAL NOTICE—RULES OF COURT.—A court will judicially notice its own rules. But the appellate court will not judicially notice what are the rules of the court below, when they are not in the record: *Monographic note to Lanfear v. Mestier*, 89 Am. Dec. 689, on judicial notice.

TRIAL—ORDER OF PROOF.—The order of evidence is within the sound discretion of the court, and it may even open the case for the purpose of receiving further evidence: *Kansas City v. Bradbury*, 45 Kan. 381; 23 Am. St. Rep. 731; *Kaufman v. Farley etc. Co.*, 78 Iowa, 679; 16 Am. St. Rep. 462, and note.

ELECTION CONTESTS—PLEADINGS—SUFFICIENCY OF.—A contestant of an election in a notice or a pleading need not give the contestee the name of every alleged illegal voter as to whom he proposes to offer proof: *Boyer v. Teague*, 106 N. C. 576; 19 Am. St. Rep. 547 and note. But the facts or combination of facts which give rise to the right of contest are to be briefly stated in the notice of contest: *Whitney v. Blackburn*, 17 Or. 564; 11 Am. St. Rep. 857; *Rutledge v. Crawford*, 91 Cal. 526; 25 Am. St. Rep. 212, and note.

ELECTION OFFICERS—DUTIES OF.—The duties of election officers are merely ministerial: *People v. Van Cleve*, 1 Mich. 362; 53 Am. Dec. 69, and note. But see *Bevard v. Hoffman*, 18 Md. 479; 81 Am. Dec. 618. See, also, *Case of Supervisors of Elections*, 114 Mass. 247; 19 Am. Rep. 341.

ARGONAUT CONSOLIDATED MINING AND MILLING COMPANY v. TURNER.

[23 COLORADO, 400.]

A PATENT FOR MINERAL LAND CARRIES WITH it the right to the surface territory described therein, together with all lodes and veins having their tops or apices within such surface territories, except, perhaps cross-lodes.

MINING PATENTS—CROSS-VEINS.—If the course of a vein is across a claim as located upon the surface, instead of in the direction of its length, the side lines of the location become end lines, and the end lines side lines, but this, so far as lateral rights are concerned, does not invalidate the patent to any part of the territory included therein.

JUDGMENT IN CONTROVERSY CONCERNING MINING CLAIMS, SUFFICIENCY OF.—In a judgment in ejectment for part of a mining claim, it is not essential, under the statute of Colorado, that the portion of the vein on which a trespass has been committed, and for which judgment is entered, be described with mathematical certainty.

EJECTMENT FOR A MINING CLAIM—POSSESSION OF THE DEFENDANT, WHEN NEED NOT BE PROVED.—If the defendants do not disclaim, but interpose some other defense in an action for the possession of a mining claim or to recover for trespass thereon, it is not necessary to prove that they have been in possession of any part of the property in dispute.

Action by Robert Turner against the Argonaut Consolidated Mining and Milling Company and others for the possession of real property and damages for trespass thereon. The plaintiffs alleged that they had, ever since January 1, 1892, been the owners of a patented mining claim known as the Cecil lode mining claim, survey lot No. 428, and of all veins and lodes the tops or apices of which were within the surface boundaries of such claim, and that the defendants, on or before March 2, 1892, wrongfully entered upon such claim and upon a lode or vein having its top or apex within the boundaries of the claim, and ousted plaintiff therefrom, and extracted ore, to the damage of plaintiff in the sum specified. The answer of the defendants denied all the allegations of the plaintiff's complaint, and averred that the defendant company was the owner of the Argyros lode mining claim, and that the trespass complained of was upon a vein the top or apex of which was within the surface boundaries of the Argyros claim, but in its downward course dipped under the Cecil mining claim into a claim to the north. The third defense was to the effect that the vein upon which the Cecil lode location was made departs in a southwesterly direction from the side lines of such lode within two hundred feet of the discovery, and does not again enter such location; that the

owners of the Cecil lode, therefore, had no right to such vein after such departure, and could not rightfully receive a patent therefor. The trial court found that the plaintiffs were the owners of the Cecil lode, describing it by metes and bounds, and also of the veins therein, though such veins in their course downward extend outside of the vertical lines of the surface. The judgment was in favor of the plaintiff for the Cecil lode mining claim, survey lot No. 428, and costs.

Marcus Finch, Enos Miles, Chas. J. Hughes, and B. H. Giles, for the appellants.

Jacob Fillius, for the appellees.

⁴⁰⁴ HAYT, C. J. The third defense was interposed for the purpose of showing that the vein disclosed in the discovery shaft of the Cecil mining claim departed from the side lines of the claim as marked upon the surface, the contention in the court below being that for this reason the patent was absolutely void beyond the point of such departure. In support of this theory of the law the case of *Armstrong v. Lower*, 6 Colo. 399, and similar cases are cited, and the following language from the opinion in *Armstrong v. Lower*, 6 Colo. 399, is particularly relied upon: "The vein is, of course, the principal thing, and the location should be made in conformity with the strike thereof. If the lode terminates at any point within the location, or departs at any point from the side lines, the location beyond such point is defeasible, if not void." But that was an adversary proceeding before patent, certified from the United States landoffice to the court for adjudication, in order that the rights of the parties might be determined, and patents issued accordingly; but the rule is otherwise after the patent has once been issued. The patent carries with it the ⁴⁰⁵ right to the surface territory described therein, together with all lodes or veins having their tops or apices within such surface boundaries, except, perhaps, cross-lodes. Hence, while an adverse claimant may, to prevent entry, show that the vein relied upon by his adversary departs from the side lines of the claim, he cannot, for this reason, invalidate a patent after the same has once been issued. The land department of the government is the tribunal selected for the determination of such controversies, subject to transfer to the courts under certain conditions, and a patent issued by the land department must be taken in an action at law as conclusive evidence of title in the patentee: *Smelting Co. v. Kemp*, 104 U. S. 636.

It is contended that appellants' third defense was filed in order that they might show that the vein upon which the trespass was committed was a vein the apex of which crossed one, if not both, of the side lines of the Cecil claim; but we find nothing in the pleading to warrant this contention of counsel. A reading of the defense will show that it was filed for another and different purpose, to wit, to question plaintiffs' patent title. Plaintiffs do not base their right to recover upon any claim that they were working upon the identical vein disclosed in the Cecil discovery shaft, this shaft being near the easterly end of the Cecil claim, the claim of the plaintiffs being that the defendants were trespassing upon a vein twelve hundred feet from that point, and near the westerly end of the Cecil claim.

The evidence shows beyond question that this vein enters the end line of the Cecil claim on the west, and extends for a considerable distance along the Cecil claim in a direction parallel, or nearly parallel, to the side lines. There is nothing to indicate that this vein in its strike departs from the ground covered by the Cecil patent, while all of the evidence shows that the apex of the vein is within the Cecil claim, and hence, in its downward course or dip, it is included in the Cecil patent by the very terms of the patent and the statute under which it was issued: U. S. Rev. Stats., sec. 2322.

⁴⁰⁶ We concede, as we must, that where the course of a vein is across the claim as located upon the surface, instead of in the direction of its length, the side lines of the location become the end lines, and the end lines become the side lines, so far as lateral rights are concerned; but this does not invalidate the patent as to any part of the territory included therein: *King v. Amy etc. Min. Co.*, 152 U. S. 222; *Last Chance Min. Co. v. Tyler Min. Co.*, 157 U. S. 683. But no such question is properly involved in this case. The maps and oral evidence disclose that the vein in controversy has been worked for over four hundred feet in a lateral direction by shafts, tunnels, and drifts, and that this work discloses a well-defined vein, with a general course parallel, or nearly parallel, to the Cecil claim, as staked upon the surface, with its apex within the surface boundaries of that claim, after the vein leaves the Wallace claim, and enters the Cecil—the Wallace being a mining claim abutting the Cecil on the west end.

The trespass complained of in this case was at a point north of the north side line of the Cecil claim, where the vein was

carried in its downward course by reason of its dip, and the only contention is as to the apex of this vein. The particular place where the work was being done by the defendants seems not to have been in dispute in the court below. The record discloses that counsel then appearing for these appellants were sufficiently well-informed as to the place of the trespass to conduct a vigorous cross-examination in reference thereto.

It is also claimed that the findings and judgment are not sufficiently specific; that the territory trespassed upon must be described with the certainty which should, and usually does, mark the description given by a civil engineer. In support of this contention, section 271 of the code is relied upon: "The judgment in an action brought under this chapter shall be in accordance with the verdict, or, if tried by the court, the judgment shall particularly specify the findings ⁴⁰⁷ of the court, the same as the jury are, by this chapter, required to specify in their findings in the verdict, and, if judgment be rendered for the plaintiff, it shall specify the amount of damages to be recovered."

We do not agree with counsel in their contention that it is necessary to describe the portion of the vein trespassed upon with mathematical certainty, although it may be advisable to do so where it is available, but such a description can only be obtained by an expert mining engineer, and the services of one sufficiently skilled may be beyond the resources of the ordinary miner. Hence, to require such a description would work a hardship in many cases, with no corresponding benefit. Moreover, if appellants wish the point of trespass defined with greater certainty, they should have called upon the trial court for greater minuteness of description. Not having done so, the right has been waived. The evidence shows where the trespass was committed, and it supports the finding that such trespass was upon a vein, the apex of which is within the Cecil claim as patented, and by reference to the maps introduced in evidence, the judgment can be made sufficiently certain for all practical purposes.

It is urged that the evidence does not disclose that the defendants, or either of them, were ever in possession of the property in dispute. This, however, is immaterial, as no disclaimer was filed, and, under our code, when the defendant makes any other answer or defense, no proof of possession is necessary in the absence of a disclaimer: Code, sec. 276.

Finding no error in the record, the judgment of the district court will be affirmed.

MINES AND MINING—RIGHT TO FOLLOW LODES—CROSS-VEINS.—Where a miner has a surface location together with a lode following its dips, spurs, and angles, he is entitled to the surface and the lode wherever it may go, so far at least as it may extend under the public land: *Fitzgerald v. Clark*, 17 Mont. 100; 52 Am. St. Rep. 665, and note. When, in making a location, the claimant calls the longer lines which cross the vein, side lines, and the shorter lines, which do not cross it, end lines, the court must disregard in its decision, the mistake of the locator in the designation of the side and end lines, and hold the locator to the lines properly designated by him, as it cannot relocate them for him: Note to *Fitzgerald v. Clark*, 52 Am. St. Rep. 663. See the monographic note to *McClintock v. Bryden*, 63 Am. Dec. 109, and to *Catron v. Old*, post, p. 000.

EJECTMENT—ALLEGATION OF POSSESSION OF PLAINTIFF.—To maintain ejectment under prior possession, plaintiff need not show such possession in himself: *Bird v. Lisbros*, 9 Cal. 1; 70 Am. Dec. 617, and note. A plaintiff in ejectment must recover upon the strength of his own title, however, and not upon the weakness of his adversary's: *Cox v. Arnold*, 129 Mo. 337; 50 Am. St. Rep. 450, and note; *Barrett v. Hinckley*, 124 Ill. 82; 7 Am. St. Rep. 331, and note.

ZANG v. ADAMS.

[23 COLORADO, 408.]

CORPORATIONS, SUBSCRIPTION TO, OBTAINED BY FRAUD.—One who is induced to subscribe for stock in a corporation by fraudulent misrepresentations of one of its officers is entitled to be released from such subscription and to defend an action upon a promissory note given for the amount thereof, if the officer acted as agent of the corporation in securing the subscription, or if it has ratified his acts by knowingly accepting the purchase money and applying the same to its use.

FRAUD, MISSTATEMENT AS TO COST OF PROPERTY.—A statement by an agent of a corporation that the property constituting its sole assets cost it a designated sum is not a mere expression of opinion by him as to its value. It is a representation as to a material fact, and if it is false and induces a subscription to the capital stock of the corporation, the subscriber is entitled to be released therefrom.

FALSE REPRESENTATIONS, THE TRUTH OF WHICH CAN BE ASCERTAINED.—The fact that a subscriber to the capital stock of a corporation might, by investigating the records in a public office in a county in which its property is situate, have ascertained that the representations made to him respecting the cost of such property were false, does not deprive him of the right to rescind his contract of subscription because of such misrepresentations.

CORPORATIONS—STOCKHOLDER'S RIGHT TO RESCIND SUBSCRIPTIONS TO STOCK.—To entitle a subscriber to the stock of a corporation to exempt himself from liability upon his subscription on account of fraud of the corporation in misrepresenting or concealing facts inducing a subscription, he should, within a reasonable time after discovering the fraud, and before the rights of innocent third persons have accrued, rescind, or offer to rescind, the contract, which includes the duty to return, or offer to return, his stock to the company.

RESCISSION—OFFER TO RETURN PROPERTY, WHEN NOT ESSENTIAL.—One seeking a rescission of his contract of subscription to the capital stock of a corporation need not offer to return such stock, if, at the time of his discovery of the fraud on account of which he claims the right to rescind, the note which he had given for his subscription had been transferred by the corporation as collateral security, and was not in his possession, and the stock itself was of no value whatever.

RESCISSION, LACHES, WHEN NOT SO GREAT AS TO PREVENT EXERCISE OF RIGHT OF.—A delay of two months after the discovery of the falseness of a representation inducing a subscription to the stock of a corporation in securing a rescission, is not so unreasonable as to preclude the subscriber from rescinding his contract of subscription and defending against a promissory note given on account of the subscription, no rights of innocent holders of such note being involved.

CORPORATION—COST OF PROPERTY.—If promoters of a corporation receive an option entitling them to purchase property at a price specified, and then convey it to another person for a much greater pretended consideration, he giving his notes for the pretended purchase price, and afterward conveying the property to the corporation for a still greater purported consideration, it assuming the payment of the notes executed by him to his immediate grantor, and all such notes are afterward delivered to the corporation, and canceled as having been paid, when no payment had been made thereon, a statement that the property cost the sum named in the deed to the corporation is false, and the true cost is the sum at which the promoters were entitled to purchase it of the original vendor.

Action by Adams, receiver of the Commercial National Bank, upon a non-negotiable note executed by Adolph J. Zang to the South Galveston Land Company and by it transferred to the South Galveston Investment Company which indorsed it to the bank. The defense was, that the note was given in part payment of a subscription for two hundred shares of the capital stock of the land company, and that the subscription was induced by false representations. The trial judge found in favor of the plaintiff, and a judgment was entered against the defendant for the full amount sued for. It thereupon appealed.

C. E. & F. Herrington and S. L. Carpenter, for the appellant.

Thomas, Hartzell, Bryant & Lee, for the appellees.

409 **CAMPBELL, J.** In view of an admission by the plaintiff as to notice of the alleged infirmity of the note, this controversy is to be treated as though it were one between the payee and maker. Upon the evidence, in so far as it pertains to the material questions, there is no controversy. The only difficulty arises in the application of the law to the admitted facts.

The land company was organized for the sole purpose of acquiring title to, and improving and selling, a tract of land known

as South Galveston, on Galveston Island, in the state of Texas. This land was all that the company owned, and constituted its sole assets. The capital stock of the company was \$500,000, divided into 5,000 shares of the par value of \$100 each, \$35 of each share being payable in cash, the balance in installments payable at stated times and in fixed sums.

⁴¹⁰ The defendant bought at its par value 200 shares of the stock of the company through George J. Gray, its president, and the proof is that Gray then represented to him that the land cost \$425,000. The claim of defendant now is, that the actual cost was only \$110,000. Zang had never seen the land, knew nothing as to its cost or value, and implicitly relied upon this representation, and would not have bought the stock had he known what the real facts were.

That the controversy between these parties may be more clearly understood, we give, in brief, the contentions of their respective counsel. That of the defendant, as just indicated, is that the admitted facts show a want of consideration for the note. Upon the other hand, the plaintiff's contention is that the representations, whether true or false, were made by a promoter of the company, for which the latter is not liable; that, whether true or false, they are, substantially, expressions of opinion as to the value of the property, and of a character which does not avoid the contract of subscription, even if the same were made upon the faith thereof; that the defendant should not have relied upon them, but might have ascertained the facts in the case by consulting the records in Galveston; that before he can defeat an action upon the note, he must have rescinded the contract and notified the land company (the payee) that he would not be bound by his subscription, and thereupon delivered, or tendered, to the company his certificate of stock; that if the representations were made by the company, or by its authorized agent, and if false, and acted upon, ground for rescission, still the evidence shows that they were true.

The cases like *Davis etc. Wheel Co. v. Davis etc. Wagon Co.*, 20 Fed. Rep. 699, and *The Distilled Spirits*, 11 Wall. 356, cited by the appellee, are not applicable here, though correctly stating the law under the facts of those cases. They go to the point, *inter alia*, that a corporation is not affected with notice of facts within the knowledge of its promoters, acquired before the corporation was organized. It may be, and doubtless is, true that these promoters perpetrated frauds ⁴¹¹ upon their company by

acts committed both before and after the company was incorporated. With these we are not now concerned. In the case at bar, Zang purchased his stock after the company was incorporated, and obtained it directly from the company itself, through its president. If there was fraud in securing the contract of subscription, it was that of the company, and the company is bound, not only because Gray was its agent and Zang was justified in so believing, but because the company ratified the act of its agent by knowingly accepting Zang's money, and applying the same to its own use. If this were not so, a corporation could never be bound, for it can act only through its agents.

The statement by Gray, as the agent of the company for the sale of stock, that the land cost the company a certain sum of money, is not a mere expression of opinion by him as to its value. One who relies upon the truth of such a statement may, by a fair interpretation of the language, take it to mean not that the agent believes the land to be of that value, but that the company actually paid to its grantor that amount. If so, then this is a material fact which naturally would tend to make the stock, in the eye of a contemplated purchaser, worth more than if the land had cost the company but one-fourth of such sum. We think this representation one of fact—a material fact—and, if relied upon, and it proves to be incorrect, is a sufficient ground for rescinding the contract of subscription as against the company, unless the right has been lost through the laches or fault of the subscriber. That this statement was made, that it was relied upon by the defendant, that he had the right to rely upon it, that it was false, and was the inducement for the purchase of the stock, the testimony leaves no room for doubt: *Van Epps v. Harrison*, 5 Hill, 63; 40 Am. Dec. 314; *Henderson v. Henshall*, 54 Fed. Rep. 320; *Page v. Parker*, 43 N. H. 363; 80 Am. Dec. 172.

The contention that the defendant ought not to have believed Gray, but should have investigated the records at Galveston for the purpose of ascertaining the facts, and that because he did not do so he therefore should be held to his ⁴¹² contract as a punishment for his credulity, does not commend itself to us with special force. Where a willful wrong has been committed, courts are not keen to find an avenue of escape for the wrongdoer, merely because the victim has been unsuspecting. The defendant was not bound to make inquiries to ascertain whether or not the cost of the land was in fact as represented by Gray, but he

was justified in believing the representation as made: *Wilson v. Higbee*, 62 Fed. Rep. 723, 726, and cases cited.

But if he had consulted the records, he would have found in a recital in an instrument there recorded that the company paid for the land \$425,000; but the testimony in this case shows beyond any controversy that such pretended consideration was, in fact, never paid, and was never agreed, or intended, to be paid, to the grantor by the company; but that, by a fictitious and fraudulent arrangement between some of the promoters of the company, the face of the record was made to show such a payment, whereas, in truth and in fact, the entire consideration which the company agreed to pay for the land was \$110,000; \$15,000 of which was paid in cash, and a note of the company for the balance of \$95,000 given, secured by a trust deed upon the premises, which trust deed was afterward foreclosed, and the entire property of the company taken from it in part satisfaction of this indebtedness. So that the defendant's right to rescind because of his failure to examine the records, even were that required, is not thereby lost, because such investigation would not have revealed the truth.

The general rule undoubtedly is, that to entitle a subscriber to the capital stock of an incorporated company to exempt himself from liability upon his subscription on the ground of fraud of the company in misrepresenting, or concealing, facts which induced the subscription, he should, within a reasonable time after the discovery of the fraud, and before the rights of innocent third parties have accrued upon the faith of his name, rescind, or offer to rescind, the contract, which includes the duty to return, or offer to return, ⁴¹³ his stock, to the company. This rule cannot be applied in this case. Zang did not discover the fraud until some time in July, 1893, and we are satisfied that he is not to be charged with negligence in not sooner discovering the same. The note sued upon had been pledged as collateral security to the bank on March 16th of the same year. On September 28, 1893, the land company's note, which was secured by a trust deed upon its property, was foreclosed because of default in the payment of interest and a part of the principal. The company then had no property of any kind, and the stock was absolutely worthless. This suit was brought October 7, 1893. It would have been a useless proceeding for Zang to have tendered his stock to the company and notified it that he was no longer bound, and asked for a return of his note, at the time he dis-

covered the fraud, for the note had theretofore been pledged as collateral security with the bank, and the stock was of no value whatever.

We are of opinion that the two months intervening between July, 1893, when the fraud was discovered, and October, 1893, when this suit was brought, was not such an unreasonable time as to preclude Zang from setting up as a defense when thus sued upon the note a want of consideration arising out of the fraud of the company, and no rights of innocent, bona fide holders were involved.

The last contention is, that the evidence in the case shows that this land actually cost the company \$425,000. In brief, the facts upon this phase of the case as disclosed by the record are as follows: The promoters of this company, for its benefit, took up an option which they held from Mott, the owner of the land, for \$110,000, and conveyance was to them direct. Before incorporating the company, they deeded the land to one Pratt for a pretended consideration of \$400,000. Pratt then gave his notes to one E. B. Jones for \$230,000, which was secured by a trust deed upon the land. Thereafter, Pratt conveyed the premises to the land company for an alleged consideration of \$425,000, and in the deed the land company assumed and agreed to pay, as part of the purchase ⁴¹⁴ price, the balance of the indebtedness due to the original owners of the land of \$95,000, and the said notes for \$230,000.

The evidence discloses, beyond all question, that Pratt was simply a go-between of the company and the promoters, that for the notes pretended to be given to Jones there was no consideration whatever, nor for the trust deed securing the same; nor were the notes ever delivered to Jones, but were retained by Gray and his fellow promoters until they were delivered to the land company canceled as having been paid, though they were never paid, although the trust deed securing them was in due time released. There never was any intention upon the part of any of the parties to these various frauds that the company should be charged with the payment of any sum of money except the \$110,000, which was the price to be received by the original owner of the land, nor was there any agreement to pay any other or larger sum therefor; and these mean conveyances were simply a subterfuge, a trick, and a fraud, perpetrated by Gray and his fellow promoters for purposes of their own.

What is clearly apparent to us is that the cost of this land was not as represented by Gray, and that is as far as we need to go

in the investigation of the various acts of fraud undoubtedly committed by the promoters of this company, and by the latter through its officers.

In the brief of appellee is set out what purports to be a finding of facts by the court, although we do not find the same either in the transcript of the record or in the abstract; but, if it correctly sets forth the findings of the court, it appears therefrom that the court considered this representation of the cost to be merely an expression of opinion as to value, and not sufficient to justify a rescission of the contract by a stockholder who bought upon the faith thereof. The court also apparently found that the land cost the corporation \$425,000. This finding has no foundation in the facts of this case, but evidently was an inference drawn by the court from the recital of such consideration in the deed which the company received from Pratt; but, as we have shown above, ⁴¹⁵ this was clearly, under the undisputed evidence in the case, an incorrect recital. The point made that the subsequent conduct of Zang, in connection with other stockholders, in forming a syndicate to buy this property, estops him now to repudiate his subscription to the stock of the original company, is not tenable. If he still has an interest in the land, which he denies, it is in virtue of an entirely distinct agreement, and he has paid full compensation therefor.

Upon the whole case, we are satisfied that a fraud was perpetrated upon Zang, and that he should not be required to pay this note. This works no hardship upon the bank, for the reason that it took the note charged with full notice of the equities attaching thereto. The conclusion upon this case arrived at by us finds ample support in the cases *supra* and in the following, among other authorities that might be cited: *Savage v. Bartlett*, 78 Md. 561; *Huron Printing etc. Co. v. Kittleson*, 4 S. Dak. 520; *Wilson v. Higbee*, 62 Fed. Rep. 723; *Directors etc. Cent. Ry. Co. v. Kisch*, L. R. 2 H. L. 99; *Oakes v. Turquand*, L. R. 2 H. L. 325; *Capel v. Sim's etc. Co.*, 58 L. T. 807; *New Brunswick etc. Ry. Co. v. Muggeridge*, 1 Drew. & S. 363, 380; 2 *Thompson on Corporations*, c. 24, secs. 1361, 1383; *Virginia Land Co. v. Haupt*, 90 Va. 533; 44 *Am. St. Rep.* 939; *Aaron's Reefs v. Twiss*, 74 L. T. 794; 30 *Am. Law Rev.* 940, 946.

It follows that the judgment of the district court should be reversed with instructions to dismiss the complaint, and it is so ordered.

CORPORATIONS—SUBSCRIPTION TO, OBTAINED BY FRAUD.—A person fraudulently induced by an agent or promoter

of a corporation to subscribe to its capital stock may, at his option, repudiate the contract, and the fraud may consist as well in the suppression of what is true as in the representation of what is false: *Virginia Land Co. v. Haupt*, 90 Va. 533; 44 Am. St. Rep. 839, and note. See, also, *Shick v. Citizens' etc. Co.*, 15 Ind. App. 329; 57 Am. St. Rep. 230, and note.

CORPORATIONS—SUBSCRIPTIONS TO, PROCURED BY FRAUD—RIGHT TO RESCIND—LACHES.—Laches, as a bar to a subscriber's right to repudiate his subscription to the capital stock of a corporation for fraud, begins to run only from the time when the subscriber is first chargeable with notice that a fraud has been perpetrated upon him: *Virginia Land Co. v. Haupt*, 90 Va. 533; 44 Am. St. Rep. 839. See, also, *Howard v. Turner*, 155 Pa. St. 849; 85 Am. St. Rep. 883, and note.

RESCISSION—RETURN OF CONSIDERATION.—When the thing received under a contract is worthless and of no value its return is not necessary to a valid rescission: *Extended note to Bryant v. Isburgh*, 74 Am. Dec. 661.

CATRON v. OLD.

[28 COLORADO, 433.]

MINING PATENTS—RIGHT TO CROSS-LODES.—If a vein in its strike across the country runs parallel to the side lines of a claim, the owner of the apex has the right to follow the vein to any depth in its dip beneath the surface, although in so doing he passes beyond the side lines of his claim into adjoining territory, but when the strike of the vein is across the side lines of the claim, no extra-territorial rights are acquired by reason of the ownership of the apex.

MINING PATENTS.—IF A VEIN ENTERS ONE SIDE OF A MINING CLAIM as located and patented, and goes out at another side without crossing either end line or running parallel or nearly parallel with the side lines of the claim, the owners of the claim have no right to pursue such vein if it departs from the side lines of their location.

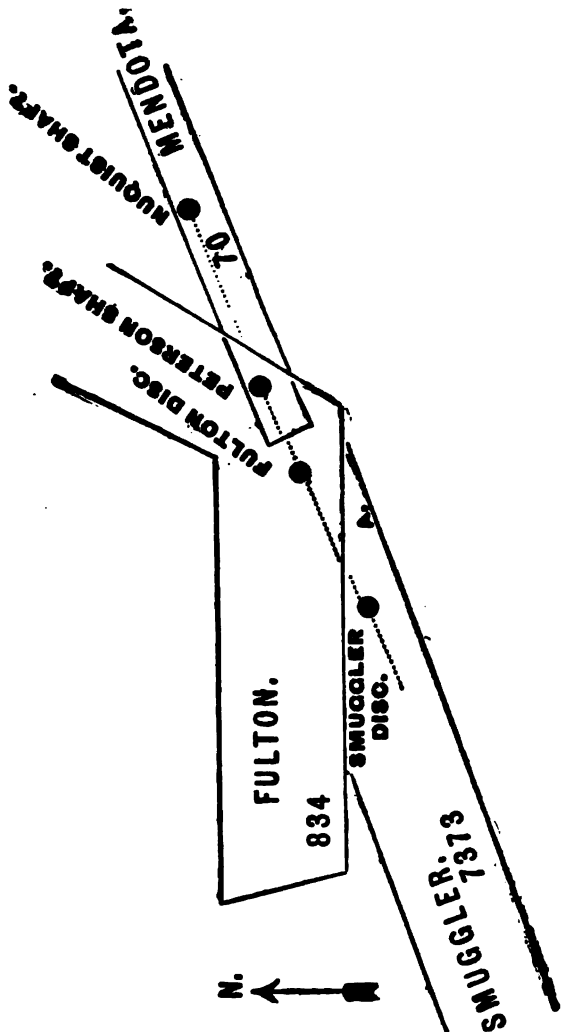
Action for the possession of real property and for damages thereto. Judgment for the defendant; plaintiff appealed.

A. D. Bullis and Morrison & De Soto, for the appellant.

E. H. Park and Jacob Fillius, for the appellee.

⁴³³ **HAYT, C. J.** Upon the facts which are conceded, a single question of law is raised. The point in controversy may be clearly understood ⁴³⁴ from the map and diagram on the next page. The plaintiff is the owner of the Smuggler mining claim, survey lot No. 7373. Defendants are the owners of the Fulton and Mendota mining claims, survey lots Nos. 70 and 834. All the claims are patented, and there is no question of surface rights. The dotted line on the map shows the apex of the vein through the claims. This vein, which has been explored exten-

ively in workings upon both the Mendota and Fulton claims, dips to the south beneath the surface of the Smuggler claim. In following the vein upon its dip, the defendants passed beyond the side line of the Fulton claim, and are working beneath the surface boundaries of the Smuggler claim at a point marked "A" upon the map.



The question presented is as to whether the vein at "A" belongs to the owners of the Fulton or to the plaintiff by reason of his ownership of the Smuggler claim. The plaintiff's right is based upon his ownership of the surface, upon the common-law principle that the owner of the surface owns all above and all beneath. The defendants claim by reason of the apex of the vein being within their surface boundaries. It is claimed that the common-law doctrine is changed by section 2322 of the Revised Statutes of the United States, which provides, *inter alia*, that the owners of the surface shall be entitled to all veins, lodes, or ledges throughout their entire depth, where the top or apex of such vein lies within the surface lines of the claim extended vertically downward, although such veins, lodes, or ledges may, in their downward course, so far depart from a perpendicular as to extend outside the side lines of such surface location, such lateral rights to be confined to such portions as lie between vertical planes drawn downward through the end lines of the location. The question is thus sharply defined: The plaintiff claims that, by reason of the strike of the vein in the Fulton location, the defendants have no extralateral rights whatever, while the defendants claim that they have such rights, and are, by reason thereof, entitled to the vein in its downward course, through the Smuggler territory.

⁴³⁶ Questions upon the law of the apex under the United States statutes are receiving much attention from mining communities and from the courts. At one time it was quite generally conceded that the owner of the apex might follow the vein upon its dip under all circumstances, but decisions of the supreme court of the United States in recent years have been contrary to such generally accepted doctrine.

In *Mining Co. v. Tabet*, 98 U. S. 463, it was held that a location laid across a vein, so that its greatest length crosses the same instead of following the course, would secure only so much of the vein as it actually crosses at the surface. In speaking of the right to follow veins upon the dip, the court said, in reference to the intent of the statute:

"We think that the intent of both statutes is, that mining locations on lodes or veins shall be made thereon lengthwise, in the general direction of such veins or lodes on the surface of the earth where they are discoverable; and that the end lines are to cross the lode and extend perpendicularly downward, and

to be continued in their own direction either way horizontally; and that the right to follow the dip outside of the side lines is based on the hypothesis that the direction of these lines corresponds substantially with the course of the lode or vein at its apex on or near the surface. It was not the intent of the law to allow a person to make his location crosswise of a vein so that the side lines shall cross it, and thereby give him the right to follow the strike of the vein outside of his side lines. That would subvert the whole system sought to be established by the law."

After this decision was rendered, it was still thought that the owner of the apex had a right to follow the vein on its dip beyond the side lines, although the vein crossed both side lines, and although the end lines were to be treated as side lines, and the side lines as end lines. The question again came before the supreme court in the case of *Iron Silver Min. Co. v. Elgin Min. etc. Co.*, 118 U. S. 196, which was a contest between the owners of the "Stone claim," located in the shape of a horseshoe, and an ⁴³⁷ adjoining claim, and it was held that as the end lines of the Stone claim as located upon the surface were not parallel, the owners had no extralateral rights, and were not permitted to follow the lode in its downward course beyond the side lines of the claim.

The question next came before that court in the case of *Argentine Min. Co. v. Terrible Min. Co.*, 122 U. S. 478, where it was again held that when the claim upon the surface crosses the vein, instead of being along the same, as provided by statute, the end lines of the claim became the side lines, and the side lines became the end lines, and that the apex rights must be determined accordingly.

Notwithstanding the vein, in its strike across the country, passed across the side lines instead of running parallel with them, the opinion had become so firmly fixed that these decisions did not entirely overthrow it, but in the subsequent case of *King v. Amy etc. Min. Co.*, 152 U. S. 222, the language of the court left no ground for dispute. In that case it was first definitely and authoritatively determined that when a vein crossed both side lines of a claim, instead of running in a direction parallel thereto, the owner of the surface had no apex rights that would allow him to follow the vein in its dip beyond a vertical plane drawn downward from the surface boundaries of the claim.

This last decision was followed in the more recent case of *Last Chance Min. Co. v. Tyler Min. Co.*, 157 U. S. 683. Therefore, it may now be said that the rule is well established in cases other than horizontal veins, if the vein in its strike across the country is parallel to the side lines of a claim, the owner of the apex has the right to follow the vein to any depth in its dip beneath the surface, although in so doing he passes beyond the side lines of his claim into adjoining territory; and it is equally as well settled that when the strike of the vein is across the side lines of a claim, no extraterritorial rights are acquired by reason of the ownership of the apex. But there are other important questions of the law of the apex which have not at this writing been ⁴⁸⁸ passed upon by the supreme court of the United States. In the case just cited it is said, as to one of such questions: "There has been no decision as to what extraterritorial rights exist if a vein enters at an end and passes out at a side line"; and it may be added, that in no case has that court directly decided the question before us in the case at bar, where the vein upon its strike enters the claim by crossing one side line and leaves the claim at the same side.

It is claimed by appellant that the facts in this case are so nearly similar to the facts in the case of *King v. Amy etc. Min. Co.*, 152 U. S. 222, that the decision in that case against the right of the apex owner is controlling here. There is, however, a marked difference between the two cases, as will be seen by a comparison of the diagram in this case with the one to be found in the opinion in that case.

Perhaps the case at bar more closely resembles the claim set up by the owners of the Stone claim, and passed upon in the case of *Iron Silver Min. Co. v. Elgin Min. etc. Co.*, 118 U. S. 196, the Stone claim being located in the shape of a horseshoe, and the location in this case being similar, although the ends of the appellees' claim are at a greater distance apart, the claim being in the form of an obtuse angle. The latest expressions of the United States supreme court upon the subject seem to indicate that the location upon the surface must substantially cover the vein, although a somewhat different construction has been put upon these cases by some of the circuit courts of the United States, and by the circuit court of appeals of the ninth circuit. In the case of *Last Chance Min. Co. v. Tyler Min. Co.*, 61 Fed.

Rep. 557, the comparative direction of the vein was thought by the court to be controlling, and, in that case, it was said to be a question of fact as to whether or not the vein extended more along than across the claim.

The doctrine of *Last Chance Min. Co. v. Tyler Min. Co.*, 61 Fed. Rep. 557, was followed in the case of *Consolidated Wyoming Gold Min. Co. v. Champion Min. Co.*, 63 Fed. Rep. 540, the opinion in both cases having been written by the same judge. In the latter case it is said:

429 "One general principle should pervade and control the various conditions found to exist in different locations, and its guiding star should be to preserve, in all cases, the essential right given by the statute to follow the lode upon its dip, as well as upon the strike, to so much thereof as its apex is found within the surface lines of the location. If the lode runs more nearly parallel with the end lines than with the side lines, as marked on the ground as such, then the end lines of the location must be considered by the courts as the side lines meant by the statute. If the lode runs more nearly parallel with the side lines than the end lines, then the end lines, as marked on the ground, are considered by the court as the end lines of the location. In both cases the extralateral rights are preserved and maintained, as defined in the statute."

In both cases the learned judge proceeds upon the doctrine of comparative direction of the lode, and it was left to the jury, as a question of fact, whether or not the vein extends more along than across the claim. The obvious objection to this doctrine is, that it introduces a feature of uncertainty into mining titles, which should be avoided, if possible. Moreover, it is in irreconcilable conflict with the decisions of the supreme court of the United States in *King v. Amy etc. Min. Co.*, 152 U. S. 222. An examination of the plat accompanying and made a part of that decision shows that the court denied extralateral rights to a vein which, in fact, runs "more along than across" the location upon the surface.

In the case of *Montana Co. v. Clark*, 42 Fed. Rep. 626, it was held that where a claim is in the form of an isosceles triangle, the owner cannot follow the lode or vein upon the dip through the side lines of the claim into another claim. This case followed the *Iron Silver Min. Co. v. Elgin Min. etc. Co.*, 118 U. S.

196, and proceeded upon the theory that to the exercise of the right to follow the vein upon its dip, the end lines must be parallel.

With the exception of the Consolidated Wyoming Gold Min. Co. v. Champion Min. Co., 63 Fed. Rep. 540, these cases were all decided before the decision in *King v. Amy etc.* ⁴⁴⁰ Min. Co., 152 U. S. 222, was announced, which case, as we have stated, contains the first direct and positive declaration upon the subject by the supreme court of the United States. There has been one decision rendered upon the question since by the district judge of this district. In *Del Monte Min. etc. Co. v. New York etc. Min. Co.*, 66 Fed. Rep. 212, a question was presented as to apex rights between the New York claims and the Del Monte claim, the New York being higher up the mountain than the Del Monte, and holding the apex. Explorations had disclosed that the New York vein, in its general course, had within its side lines the apex for a distance of one thousand and seventy feet. As the vein entered one end line of the New York claim, the only difficulty found by the district judge grew out of the fact that it departed from the side lines of the claim about two hundred and eighty feet from the end line opposite the place of entrance, the claim being less than the full length allowed by statute. In these circumstances, upon a preliminary application, the learned district judge held that the owners of the New York were entitled, by reason of their apex rights, to follow the vein in its downward course through the side lines of the claim, and beneath the surface boundaries of the Del Monte location.

While there are some expressions in the opinion which would seem to be in favor of the contention of appellees in this case, if the facts are not considered, yet when it is remembered that the vein entered one end line of the New York claim and extended more than one thousand feet in a general direction parallel to the side lines of the claim, it would seem that the decision is hardly in point in this case.

In the recent case of *Argonaut Consolidated Min. Co. v. Turner*, 23 Colo. 400, ante, p. 245, this court held that where a vein passed through an end line of a claim and extended, as far as disclosed (this being for a considerable distance) in a general direction parallel to the side lines of the location, the lower court was justified in giving the claim extralateral rights, there being no evidence to show that the vein departed from the side lines of the location at any point, the presumption ⁴⁴¹ being that the vein continued regularly upon its course.

In the case at bar, no part of the Fulton vein runs parallel or nearly parallel with the side lines of that claim, as staked upon the surface. The United States supreme court has said that if the locator of a mining claim mistakes the direction of his vein, and locates accordingly, the courts have no power to make a new location for him, but must determine his rights with reference to the location actually made: *King v. Amy etc. Min. Co.*, 152 U. S. 222. Developments made subsequent to the location of the Fulton disclose that the claim as located contains very little of the apex of the vein, and such as it does contain does not cross either end line, and does not run parallel or nearly parallel to the side lines; so that in no aspect of the law can the Fulton be allowed extralateral rights by reason of the apex of the vein. The judgment of the district court must accordingly be reversed, and the cause remanded for further proceedings in accordance with this opinion.

Patents for Mineral Lands, What Included Therein—Extralateral Rights.

Lands and Veins Included Therein.—A patent from the United States for mineral lands differs from its patents for other lands in respect to the real property included therein in two essential particulars. Any other patent or conveyance, in the absence of words limiting or enlarging its signification, embraces not only the surface of the soil, but also all real property vertically beneath, and, on the other hand, is restricted to that thus beneath. A patent to mineral lands, however, often includes the right of the patentee, or his successor in interest, to mineral which is not vertically beneath the surface of the land patented, and often leaves him and them subject to the right of another to mine for minerals which are vertically beneath such surface. By the statutes of the United States at present in force, mining claims upon veins or lodes of quartz or other rock in place "bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits heretofore located shall be governed as to length along the vein or lode by the local customs, regulations, and laws in force at the date of their location." "Such claims, if located after the tenth day of May, 1872, cannot exceed fifteen hundred feet in length along the vein or lode, and cannot extend more than three hundred feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on the tenth day of May, 1872, render such limitation necessary": U. S. Rev. Stats., sec. 2320. The rights of locators of mining locations extend to the "enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far

depart from a perpendicular in their course downward as to extend outside of the vertical side lines of such surface locations. But their right of possession of such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another": U. S. Rev. Stats., sec. 2322. A patent may issue for any land claimed and located for valuable mineral deposits. The person applying for such a patent must show compliance with the laws of the United States and the regulations of the mining district in which the land sought is situated, and his application for a patent must state, under oath, such compliance, and contain a plat and field-notes of his claim made by, or under the direction of, the United States surveyor general, "showing accurately the boundaries of the claim or claims, which shall be distinctly marked by monuments on the ground": U. S. Rev. Stats., sec. 2325.

Conclusiveness of.—When proceedings have been taken before the proper officers of the land department resulting in the issuing of a patent, such patent, like a patent issued in other cases, is in the nature of a judgment by a special tribunal respecting a matter committed to it for its determination, and conveys the legal title to the patentee, subject only to the power of a court of equity to set aside the patent, or, in a proper case, to declare the title to be held in trust for some person having a better right thereto: *Kannaugh v. Quartette Min. Co.*, 16 Colo. 341; *Argonaut etc. Min. Co. v. Turner*, 23 Colo. 400; ante, p. 245; *New Dunderberg Min. Co. v. Old*, 79 Fed. Rep. 598. Persons other than those in whose favor the patent issued can not successfully claim, in an action at law, that they have title to the property included therein: *Miller v. Girard*, 3 Colo. App. 278; *Gwillim v. Donnellan*, 115 U. S. 45; nor, on the other hand, can the person in whose favor the patent issued claim that for some reason he is entitled to lands or rights in addition thereto which ought to have been, but were not, included therein. By applying for a patent with a definite location, a patentee renounces and abandons all other rights and privileges pertaining to his discovery of the lode for which he asks a patent: *New Dunderberg Min. Co. v. Old*, 79 Fed. Rep. 598. The patent must necessarily, while it remains in force, be a final and conclusive determination of the lines of the property patented, and neither the patentee nor those claiming adversely to him will be permitted to insist that the lines are different from those described in the patent. If they are described as parallel, the owner of an adjacent claim cannot insist that they are not parallel, and that for this reason the patentee is not entitled to extralateral rights: *Waterloo Min. Co. v. Doe*, 82 Fed. Rep. 45; nor, on the other hand, can the patentee, for the purpose of extending his extralateral rights, show that the side lines were not as described in the patent,

or that under a location not included within the patent had a side line under which, if recognized in the patent, he was entitled to the extralateral rights in question: *Del Monte Min. Co. v. New York etc. Min. Co.*, 66 Fed. Rep. 212; *Waterloo Min. Co. v. Doe*, 56 Fed. Rep. 685; *King v. Amy etc. Min. Co.*, 152 U. S. 222. A patent is not however, conclusive that the apex of the vein is within the location, for, notwithstanding the patent, the vein and its apex and the points where they cross the claim as patented must be left to be determined by extrinsic testimony: *Consolidated etc. Min. Co. v. Champion etc. Min. Co.*, 63 Fed. Rep. 540. A patent, being in effect, a conveyance from the United States, cannot pass title which the United States did not have at the inception of the proceedings resulting in the patent. Therefore, if a tract of land has been patented as agricultural land, and the United States has thus parted with all title thereto, no subsequent proceedings resulting in a patent for mineral lands can defeat the prior rights of the claimant under the agricultural patent. This is true also as to extralateral rights, and though the apex of a mineral lode is on land properly included in a mining patent, the patentee is not entitled thereunder to pursue the vein after it passes beyond his side lines and enters vertically beneath the land previously included within the agricultural patent: *Amador etc. Min. Co. v. South Spring Hill etc. Min. Co.*, 36 Fed. Rep. 668.

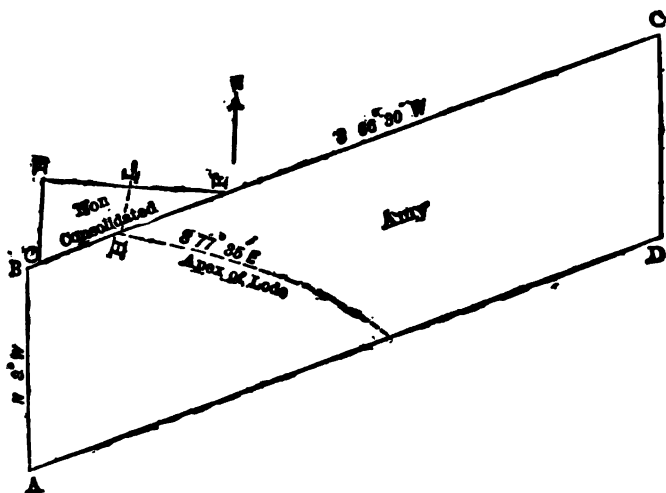
Rights to which Patentee is Subject.—As we have already shown by our quotation from the statutes of the United States, a patentee of a mining location has the right, respecting any lode or lodes, the apex of which is within the lines of his location, to follow such lode or lodes downward in their dip beyond the side lines of his location, though in so doing he goes beyond the vertical extension of such lines toward the center of the earth. The decisions recognizing this right are quite numerous: *Champion Min. Co. v. Consolidated etc. Min. Co.*, 75 Cal. 78; *Wolfley v. Lebanon Min. Co.*, 4 Colo. 112; *Johnson v. Buell*, 4 Colo. 557; *Blake v. Butte etc. Min. Co.*, 2 Utah, 54; *Eureka etc. Min. Co. v. Richmond Min. Co.*, 4 Saw. 302; *Iron Mine v. Leolla Mine*, 2 McCrary, 121; *Van Zandt v. Argentine Min. Co.*, 2 McCrary, 159; *Stevens v. Williams*, 1 McCrary, 480; *New Dunderberg Min. Co. v. Old*, 79 Fed. Rep. 598; *King v. Amy etc. Min. Co.*, 152 U. S. 222; *Iron etc. Min. Co. v. Elgin etc. Co.*, 118 U. S. 196; *Iron etc. Min. Co. v. Cheesman*, 118 U. S. 529; *Flagstaff Min. Co. v. Tarbet*, 93 U. S. 463. In this respect it must be conceded that property passes under a mining patent which would not be included in any other patent or conveyance having the same surface boundaries. The right thus given to the patentee to follow his vein beneath the surface, though it should go vertically beyond the side lines of this location, is necessarily subject to similar rights in favor of other patentees, whether their patent is prior or subsequent to his. Hence, if another mining location is made by the side of his, and a patent issues therefor, the patentee, as to any lode or vein having its apex within his location, has the right to pursue such vein beneath the earth, though in so doing he passes beyond the surface of another mining location whether the patent thereto has priority of his or

not: *Montana Co. v. Clark*, 42 Fed. Rep. 626; *Colorado etc. Min. Co. v. Turck*, 50 Fed. Rep. 888. The patentee is also subject to the rights given to junior locators of cross or intersecting lodes by section 2336 of the Revised Statutes. Such locators have the right of way through the space of intersection for the purposes of the convenient working of their mine. To what extent they may be entitled to ore in the intersecting lode and within the boundaries of the prior location is a question which we reserve for consideration in another part of this note.

As to the End Lines of a Mining Location, the patentee's title does not extend beyond them either upon or beneath the surface. Hence, no part of the lode found beyond either end line of the location as patented belongs to the patentee, and he has no right to any part thereof, whether upon or beneath the surface, and it is therefore subject to location by any other person who may choose to take the necessary steps to that end: *Walrath v. Champion Min. Co.*, 72 Fed. Rep. 978; *Larkin v. Upton*, 144 U. S. 19.

Classification of Departures from an Ideal Location.—If the direction and width of a vein or lode were always accurately known at the making of locations or even at the time of applying for patents, undoubtedly the theory of the statute would be pursued, and the tract sought to be included within the patent would be so designated, if possible, as to run substantially parallel to the vein or lode and to include three hundred feet, or such lesser distance as the mining regulations exacted, on each side of the middle thereof at the surface. This would be an ideal location. There would be no doubt that the lines designated as side lines were such in fact, and that the patentee had a right to all of the lode between planes projected vertically beneath his end lines, and between such planes had the right to pursue and mine his lode, though, in descending beneath the surface, it dipped laterally so as to extend far beyond planes projected vertically beneath his side lines. But even when the location of a lode is definitely ascertained, it is not often that the statute can be fully complied with. It contemplates that the location shall run parallel to the lode, and demands that the "end lines of each claim shall be parallel to each other": U. S. Rev. Stats., sec. 2320. If a vein does not run in a direction approaching a straight line, it may be exceedingly difficult, if not impossible, to describe side lines which are parallel thereto, and end lines which are parallel to each other. At all events, there are few, if any, ideal locations in which the lode runs through both end lines and with the middle of the vein substantially equidistant from the side lines at all points. Among the departures from the ideal location the following are the most familiar: 1. Veins crossing what are designated in the application as the side lines of the location; 2. Veins entering through an end, and departing by a side line; 3. Veins entering and also leaving the location by the same side line; 4. Veins entering, departing from, and returning to, a location; 5. Veins which do not cross any line of the location, or cross but one; 6. Veins the apex of which is not wholly included within the side lines of the location; 7. Locations embracing the apex of two or more veins.

When Side Lines Become End Lines.—A locator cannot, by his arbitrary action, or by a description founded upon a mistake respecting the direction of a vein, determine what are side, nor what are end lines. Undoubtedly, every locator when filing the diagram and field-notes of the property proposed to be located, or for which he seeks a patent, supposes the longer lines to be side lines and the shorter ones to be end lines, but the lines which cross the lode are end lines, and those which do not are side lines, or, as it is sometimes expressed, when it is found that the strike is across the location, rather than lengthwise with it, the end lines become side lines and the side lines end lines: Tombstone etc. Min. Co. v. Way Up Min. Co., 1 Ariz. 428; New Dunderberg Min. Co. v. Old, 79 Fed. Rep. 598; Flagstaff Min. Co. v. Tarbet, 98 U. S. 463; Argentine Min. Co. v. Terrible Min. Co., 122 U. S. 478. This is well illustrated by the following diagram showing the location of the Amy and the Non-Consolidated mines:



The location of the Amy was doubtless made on the theory that the lode ran southerly sixty-six degrees and thirty minutes west midway between the lines B C and A D and across the lines A B and C D. It did not, however, cross the latter lines at all, but did cross the former, and on the northeasterly side of the Amy entered the boundaries of the Nón-Consolidated, its course at that point being north seventy-seven and a half degrees west. Its dip extended beneath the surface of the location of the Non-Consolidated mine, and hence the owners of the Amy claimed the right to pursue this vein on its dip either to a plane descending vertically beneath the surface at the point H and extending parallel to the line A B, or else to a similar plane at the same point extending at right angles to the course of the lode at that point. The decision of the state court was in favor of the latter claim, and affirmed the right of the

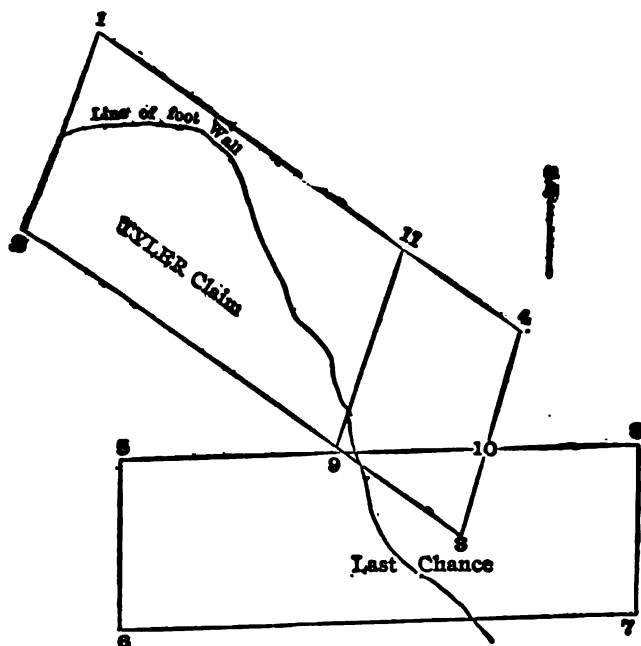
Amy to mine up to the point H where the vein crossed the line B C, and to follow the dip at right angles to the course of the vein at this point H, and hence to so much of the dip as might be found beneath the surface of the triangle H I F: King v. Amy etc. Min. Co., 9 Mont. 543. This decision was reversed by the supreme court of the United States, which held not only that the line B C was the end line of the Amy location, but further that the owners of that mine were not entitled to any part of the dip of the vein beyond a plane extended vertically beneath such line: King v. Amy etc. Min. Co., 152 U. S. 222. In this case, there was no doubt that the locators of the Amy mine might have included the disputed territory in their location, and doubtless would have done so had they then known the direction of the vein, but, as has been said in several cases, the courts cannot make locations, but must accept such as have been made by locators when included in their patents.

In perhaps every instance in which it is found that the side lines must be accepted as end lines and the end lines as side lines, the territory embraced in the patent includes more than three hundred feet on one, and perhaps on both, sides of the middle of the vein, and may, therefore, include a lode or a part of a lode which would not and could not have been included had the application for the patent correctly described the lines and their relation to the lode. Thus, in the case of the Amy mine, a diagram of which has already been shown herein, if, as the court held, the lines designated as end lines in the location must be taken as side lines, then the width of the location was fourteen hundred and seventy feet, and one point of the side line O D was more than a thousand feet from the middle of the lode, whereas the statute contemplates that in no instance shall the locator be entitled to a width of greater than three hundred feet on each side of the middle of the lode, nor to a total width of more than six hundred feet. It seems to be conceded, however, that after a patent has issued, neither it nor any part of it may be avoided in a collateral proceeding on account of an incorrect designation of the side and end lines in the respects here under consideration, and therefore that it vests the patentee with the title not only to the surface included within its boundaries, but also to every vein whose apex is within their limits: Argonaut etc. Min. Co. v. Turner, 23 Colo. 400; ante, p. 245; King v. Amy etc. Min. Co., 152 U. S. 222.

Parallelism of End Lines.—Before proceeding further we shall consider the necessity that the end lines be parallel to each other. The statute commands that they shall be so, and this command, we apprehend, loses none of its force because it appears that, through mistake or otherwise, what were designated in the application as side lines were in fact end lines. It is established that a patent is not invalid because the end lines are not parallel. A location may embrace territory in the form of a triangle, or of a horseshoe, or in such other form that the end lines neither are nor can be parallel and at the same time embrace the lode or that part thereof sought to be located and patented. Whether the want of parallelism is caused

by necessity, inadvertence, or otherwise, the patent cannot be collaterally avoided therefor, but in one respect its effect is very substantially impaired. It does not confer any extralateral rights, and a holder of the title under it has no right in any mineral not vertically beneath the territory described therein, though such mineral is a part of a lode having its apex within such territory: *Montana v. Clark*, 42 Fed. Rep. 626; *Iron etc. Min. Co. v. Elgin Min. Co.*, 118 U. S. 196; *Tyler Min. Co. v. Sweeney*, 54 Fed. Rep. 284. In controversies respecting locations in which end and side lines have not been correctly designated in the patent, the real dispute between the parties has rarely been concerning the location of the lines upon the surface, nor as to what were the true end lines, but what were the extralateral rights of the parties after those lines were ascertained.

Lodes Entering by an End and Leaving by a Side Line.—The locations of the second class are fairly represented by this diagram showing the boundaries of a location known as the Tyler, while the locations of the class first referred to are again illustrated by the same diagram in so far as it discloses the boundaries of the Last Chance.



If the definition we have heretofore given of end lines is correct, namely, that they are the lines crossing the lode, then the true end lines of the Tyler claim as originally located were the lines 1-2 and 2-3, which, instead of being parallel, are nearly at right angles to each other. Both the Tyler and the Last Chance as originally

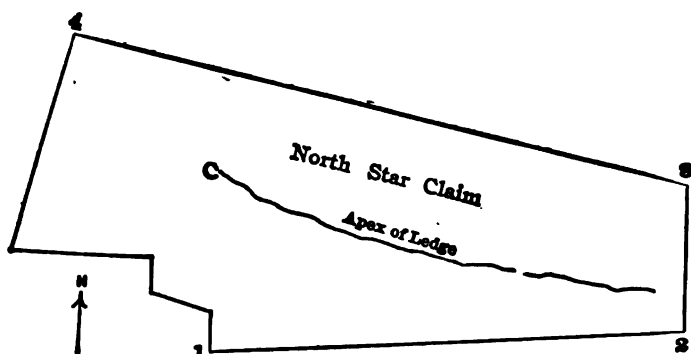
located were in the form of a parallelogram. In a suit between the owners of these claims, in which the Last Chance alleged priority of location, the allegation was conceded, and the triangle 3-9-10 was awarded to the Last Chance, and the Tyler subsequently abandoned all claim, not only to that triangle, but also to the whole easterly four hundred and twenty feet of the claim, and afterward received a certificate of purchase for the land included between the points 1-2, 9, and 11, instead of between the two points 1-2 and 3-4, as at first claimed. In a subsequent controversy between the owners of these two claims respecting their extralateral rights, the court was of the opinion that where a lode enters an end line of a location and passes out of a side line thereof, the locator has the same extralateral rights as if he had named as the end line of the location a line commencing at the point where the lode crosses his side line and extending thence across the location parallel to such end line: *Tyler Min. Co. v. Sweeney*, 54 Fed. Rep. 284; reversed without considering this question in *Last Chance Min. Co. v. Tyler Min. Co.*, 157 U. S. 682. This case, as well as several others, holds that where a lode passes through an end line of a location and runs through the greater part thereof before it passes out at a side line, the fact that the two lines through which it thus runs are not parallel does not deprive the patentee of extralateral rights, and that such rights do not necessarily terminate with a plane projected vertically beneath the side line through which the lode passes out of and beyond the location: *Del Monte etc. Min. Co. v. New York etc. Min. Co.*, 66 Fed. Rep. 212; *Consolidated etc. Co. v. Champion Min. Co.*, 63 Fed. Rep. 540; *Fitzgerald v. Clark*, 17 Mont. 100; 52 Am. St. Rep. 665. These decisions, though made after that of the supreme court of the United States in the case of *King v. Amy etc. Min. Co.*, 152 U. S. 322, are perhaps, irreconcilable with it. They were all made by judges whose opinions were, doubtless, in conflict with that expressed by the supreme court of the United States in the case last cited, and they were not prepared to follow it, except in cases precisely identical, namely, those in which the lode, instead of entering at an end and departing through a side line, crossed the location, thus turning into end lines two lines which, while originally designated as side lines, were parallel or at least opposite to each other. The question is one of great difficulty and cannot be regarded as settled until the supreme court of the United States shall hereafter settle it, and realizing the difficulty of the question, it is manifestly determined not to meet it until a case shall be presented rendering its consideration unavoidable. The courts, holding that the fact that a lode entering through an end departs by a side line of a location does not deprive its owner of extralateral rights, declare that the rights of the patentee must be determined as if a new end line were drawn "where the ledge crosses the side line and between the prolonged planes of the located and constructed end lines, the locator may follow the ledge on its dip beyond his side lines," but his right to so follow it cannot be pursued to the extent of entering vertically beneath the end line of a prior valid location: *Tyler Min. Co. v. Last Chance Min. Co.*, 71 Fed. Rep. 848. This action of the courts in supplying

an end line at a place where it was not designated in the application for a patent appears to be the doing of what courts have in other cases said could not be done, namely, changing the form of the location. If this new, or constructive end line theory is to prevail, what is to become of the space between it and the end line which was named in the application, such space having in it no part of the lode which the locator had in his mind when he made his location and application for a patent? Is he, as to that space, entitled to other lodes or veins whose apices are therein? If so, he seems to gain a possible advantage from his incorrect location, in that it may be constructively corrected for him by the courts when it is found that the lode departs at his side line, and yet his location be retained in its original form for other purposes.

Lode Entering and Leaving by a Side Line.—The principal case affords an illustration of locations of the third class; namely, those in which the vein enters what is designated as a side line and also departs from the location by the same line and before crossing any other. Perhaps the court in the principal case was mistaken in holding that the vein entered and left the location by the same side line. The diagram forming a part of the opinion shows that the lode crossed two lines which ran nearly at right angles to each other, and, although they were doubtless intended by the locator as parts of a side line, they were, or at least one of them was, an end line, within the definitions heretofore given by the supreme court of the nation, because it crossed the lode nearly at right angles to its general course. The court held that such a location gave the patentee no extraterritorial rights: *Catron v. Old*, 23 Colo. 433, ante, p. 256.

Lodes Leaving and Afterward Re-entering Locations.—*Waterloo Min. Co. v. Doe*, 82 Fed. Rep. 45, probably involved a location of the fourth class, namely, one in which the vein, after entering through one line of the location departs through another, and again enters the location through the line whence it departed. Upon the assumption that such was the case, the court went no farther than to express its opinion that the patentee could have no right to any part of a vein the apex of which was not within his premises.

Lodes Crossing but One Line, or Perhaps Crossing Neither Line.—The cases of the sixth class are those in which it appears that the apex of the vein exists within the location, but is shown to cross but one line thereof, and perhaps not shown to cross either, though running for some distance between, and substantially parallel to, what are designated as side lines. Thus what is known as the North Star claim was composed of a number of locations made prior to the passage of the act of Congress of 1872, and which were not, therefore, required to have parallel end lines, and as patented was in the following form:



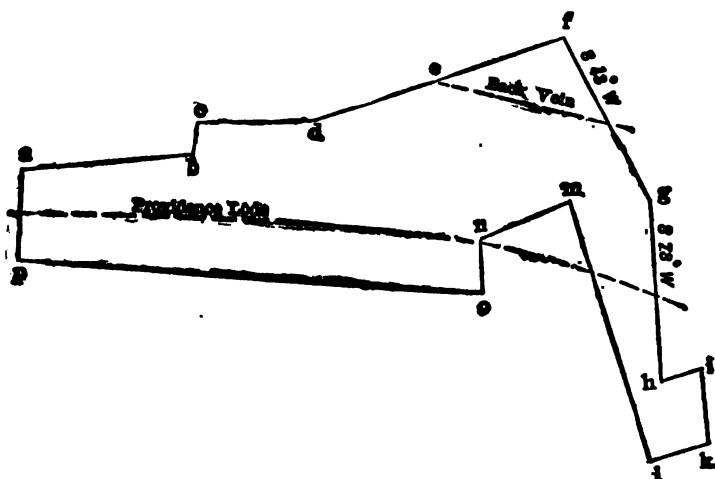
The inclination of the courts is to treat locations like these, so far as lateral rights are involved, as if end lines had been located at the point or points within the locations where the lode terminates. Hence, in an action brought by the owners of a location north of the North Star claim, and known as the Irish-American claim, the court concluded that the lode probably passed through the eastern end line, though such was not directly shown to be the case, but acting upon the assumption that it was established that the lode terminated at the point C before reaching the western end line, the court "concluded that the defendant may follow its ledge, on its descent under the Irish-American claim, to any depth, between a perpendicular plane drawn through the east end line of its claim and another similar parallel plane crossing such claim at a point fixed as the western terminus of the ledge": *Carson City etc. Co. v. North Star Min. Co.*, 73 Fed. Rep. 597.

Veins the Apices of which are not Wholly Included within the Side Lines of a location embrace, in addition to the veins of the fourth class already spoken of, those cases in which the course of the vein is substantially parallel to the side lines, but they are not so located as to embrace the whole of the apex. Whether there can be any cases of this class depends upon what is the apex of a lode or vein within the meaning of the statute, and whether it has breadth, so that when running parallel to a side line of a location, it may be partly within and partly without it. The term "apex," it is said, had not been in use among miners prior to the enactment of the acts of the Congress of the United States respecting mining locations: *Lindley on Mines*, sec. 306. As employed elsewhere, it seems to indicate the highest point. Hence, it might be claimed that a locator is entitled to all veins, the highest point of which is to be found within the boundaries of his location. As used in these statutes, the word "apex" certainly does not mean a single point, and though it has sometimes been spoken of as a line (*Larkin v. Upton*, 144 U. S. 19, 23), if it be no more than a line, it cannot have any breadth, and it would be impossible to include part of an apex without including the whole, and two locations having a common side line could not divide the apex between them. "How should the apex of this vein be defined? It is not a point, because a point has

neither length or breadth. It is not a line, because a line has no dimension but length. It is but a succession of points. As that term is employed in the mining laws, an apex is unquestionably a surface which is a succession of lines. The apex of this ideal vein within the location is a surface bounded by the walls of the vein and the end lines of the location. This surface is, of course, irregular. It may be higher at one place within the boundaries than it is in another; but mere elevation of the upper edge of the vein at different points within the location is of no moment. If the top of the mountain were ground down to a horizontal plane, the vein as exposed would be a plane surface; but, nevertheless, it would be an apex. The fact that the exposed edge of the vein is ragged, or that the surface of the outcrop is higher in one place above a given datum plane than it is in another, makes no difference in the principle. If this upper edge does not outcrop so as to be visibly traceable on the surface, but is "blind," covered with detritus or a capping of country rock, it is still a surface bounded by the walls of the vein, and vertical planes drawn downward through the end lines. The plane of contact of the upper edge of the vein with the detritus or capping, intersected by the walls of the vein, would be the apex surface": Lindley on Mines, sec. 309. We shall not undertake to further consider what is an apex, but shall content ourselves with referring to the treatise just cited, which contains, beyond all question, the ablest and most thorough exposition extant of the American mining laws: Lindley on Mines, secs. 306-313, 583; also, Foote v. National Min. Co., 2 Mont. 403; Duggan v. Davey, 4 Dak. 110; Iron etc. Min. Co. v. Cheesman, 8 Fed. Rep. 297; 116 U. S. 529. It is sufficient for our present purpose to say that it is, we think, conceded that an apex is not a line, but that, on the contrary, it has breadth, and that such breadth may be so great that it could not be wholly included in a single location. Where, from any cause, the lines of a location do not include the whole width of the apex, it is probable that the locator does not acquire any interest in any part of the lode, or of the mineral therein, save that contained within a plane projected vertically beneath his side lines: Hall v. Equator Min. Co., Fed. Cas. No. 5931, p. 225; although it was, in one instance, assumed without question by either court or counsel that, under such circumstances, the first locator took the whole lode to the entire width: Rose v. Richmond Min. Co., 17 Nev. 25; 114 U. S. 576. Of course if the dip of the lode is toward the side of the location which the vein or its apex did not reach on the surface, the locator cannot be precluded from following it in that direction by the fact that he might not have been permitted to follow it had it been towards or beyond the other side line.

Two or More Veins in the Same Location.—It is clear that a locator or patentee whose rights are founded upon the acts of Congress now in force is not restricted to a single vein or lode, for section 2322 of the Revised Statutes expressly gives him "all veins, lodes, or ledges throughout their entire depth, the top or apex of which lies inside of his surface lines extended downward vertically, etc.": Wilhelm v. Silvester, 101 Cal. 358; Book v. Justice Min. Co., 58 Fed.

Rep. 106; New Dunderberg Min. Co. v. Old, 79 Fed. Rep. 598; Iron etc. Min. Co. v. Elgin Min. Co., 118 U. S. 196. If two or more lodes have their apices wholly within the same location, and in their course through it cross the same end lines, their existence in this condition cannot give rise to any difficult question respecting the lateral rights of their owners. They have the right to all mineral in both veins from one end line to another, and to pursue both between planes vertically projected beneath such end lines, though the dip of one or both veins should extend beyond planes projected vertically beneath the side lines: Doe v. Waterloo Min. Co., 54 Fed. Rep. 935. If, on the other hand, both the lodes enter the location through an end line, and either of them thereafter departs therefrom by a side line, the owner's extralateral rights respecting it are doubtless the same as if it were the only lode having an apex within the location: Walrath v. Champion Min. Co., 63 Fed. Rep. 552. Instances may exist of locations having within their boundaries two lodes, running parallel, or nearly parallel, to each other which as they enter or depart from the location, are crossed by lines which do not run in the same direction, in which event the question may arise as to which of these shall be deemed to be the end line, and as an end line determine the direction and extent in and to which the mine owner may follow the dip. A location made under the act of 1806 may be many sided. Its end lines need not be parallel, nor need they continue throughout their course in the same direction. Where the same end line runs in different directions which shall control extralateral rights? The Providence mining claim as patented was in this form:



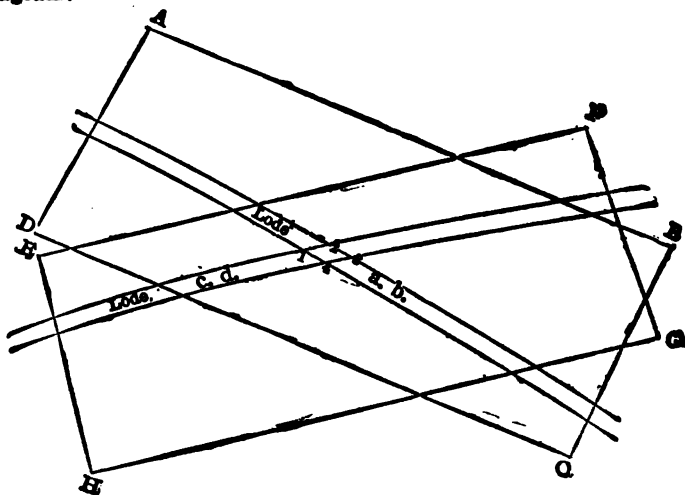
The location was intended to run along a vein which is on the diagram marked Providence lode, and the patent issued in April, 1871, was restricted to one vein or lode. Afterward, another vein was found within the limits of the ground patented and which is desig-

nated on the diagram as the Back vein. Locations were made of this Back vein, commencing at the line *f g*, and running thence along the vein in an easterly direction. The trial court held that the Statute of 1872 gave to the owners of the Providence a right to this Back vein, and further that as to the principal lode the lines *a p* and *g h* were the true end lines. As to the Back vein, it held that the line *f g* was to be regarded as the end line, and, hence, that the dip of this vein might be followed until a plane were reached which was a continuation of the line *f g*, and running south 43 degrees west: *Walrath v. Champion Min. Co.*, 63 Fed. Rep. 552. The court of appeals, on the other hand, in reversing this decision, held that there could not be two sets of end lines, one for each lode; that the lines *a f* and *g h* were the true end lines of both lodes; and, finally, that the extralateral rights of the owners of the Providence at the point in controversy "should be bounded by vertical planes drawn downward through the end line *g h* running south 78 degrees west, and through the end line *a p* extended indefinitely in their own direction, subject to the condition that the complainant has no right to enter upon the surface of the respondents' claims": *Walrath v. Champion Min. Co.*, 72 Fed. Rep. 978.

Cross or Intersecting Lode.—In many instances, two or more veins exist within the same location in such manner that the apex of one crosses the side lines and the apex of the other the end lines; but under such circumstances we do not know which set of lines should be regarded as end, nor which as side, lines. It appears to be conceded, however, that though there may be two or more veins having their apices within the same location, that there "can be but one set of end line planes which must bound the extralateral right to all the lodes": *Walrath v. Champion Min. Co.*, 72 Fed. Rep. 978; *Lindley on Mines*, sec. 593. Congress has not only recognized the existence of cross-lodes, but has been guilty of legislation respecting them apparently in conflict with section 2332, already referred to. By that section it would appear to be clear that a locator has a right to all lodes or veins within the limits of his location irrespective of their number or direction. Section 2336 of the Revised Statutes, on the other hand, declares that "where two or more veins intersect or cross each other, priority of title shall govern. Such prior location shall be entitled to all ore or mineral contained within the space of intersection; but the subsequent location shall have the right of way through the space of intersection for the purpose of the convenient working of the mine; and where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection." In a case in which it was thought probable that cross-lodes might be shown to exist within the same location, the judge expressed the opinion that there was a necessary conflict between the sections of the Revised Statutes already referred to, and that, because of such conflict, the last section should be awarded precedence as the latest expression of the legislative will, and that it gave the first locator or patentee "only such part of cross and intersecting veins as lie within the space of intersection, to the exclusion of the

remainder of such lodes and veins lying within his own territory": *Hall v. Equator etc. Co.*, Fed. Cas. No. 5931; *Morrison's Mining Rights*, 3d ed., 282. The result of this view is, that notwithstanding the locating and patenting of a mining claim, there may be a junior valid location of a cross or intersecting lode which shall entitle the junior locator to all such lode found beneath the boundaries of the prior location, except so much thereof as exists at the precise point of intersection of the two lodes. To this effect are the decisions of the Colorado state courts: *Branagan v. Dulaney*, 8 Colo. 408; *Lee v. Stahl*, 9 Colo. 208; 13 Colo. 174; *Morgenson v. Middlesex etc. Co.*, 11 Colo. 176, and the national tribunals held in that vicinity have apparently conceded their correctness: *Oscamp v. Crystal etc. Co.*, 58 Fed. Rep. 293; *Enterprise Min. Co. v. Rico-Aspen etc. Min. Co.*, 66 Fed. Rep. 200. See, also, *Pardee v. Murray*, 4 Mont. 234; *Blake v. Butte etc. Min. Co.*, 2 Utah, 54. On the other hand, the courts of Arizona and California hold that a patentee has the right to so much of any intersecting vein as lies beneath the surface of his location, and hence that a junior locator of such a vein has no right whatsoever within the boundaries of a prior location other than the right of way through the space of intersection for the purpose of the convenient working of his mine: *Waterville Min. Co. v. Leach* (Ariz. 1893), 33 Pac. Rep. 418; *Wilhelm v. Silvester*, 101 Cal. 358. Up to the present time, we believe this question has not been necessarily considered by any of the national courts.

The difference between the California and the Colorado decisions upon this subject will be more readily understood from the following diagram:



Along the lode a b, having a width of fifty feet, the location A B C D is made, six hundred feet in width and fifteen hundred feet in length; and this location, by section 2322, gives the locator the "exclusive right of possession and enjoyment of all the surface included within

the lines of the location, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines," etc. Subsequently, and perhaps after a patent has issued, the lode c d is discovered, and along it the location E F G H is made. The Colorado decisions affirm the right of the junior locator to all of the lode c d, except that within the area of the intersection of the two lodes and designated on the diagram by the figures 1, 2, 3, 4. The California and Arizona decisions, on the other hand, give to the owners of the prior location A B C D all the lode e d, except those parts outside of the lines A B and C D. If the Colorado rule shall finally prevail, a patent to a mining location will give the locator an absolute right only to those lodes whose apices run in a direction substantially parallel to his side lines, leaving open for subsequent location all lodes crossing these lines, or otherwise intersecting the lodes running between them. In some districts, of which that of Cripple Creek in Colorado is an extreme example, cross or intersecting lodes are very numerous, and the question of the right of junior locators thereto is of great importance.

Patents Under the Act of 1866.—What we have before stated herein related especially to locations made under the act of Congress of May 10, 1872, or under the subsequently enacted Revised Statutes of the United States. The first national legislation authorizing the locating, purchasing, and patenting of mining claims was the statute approved July 26, 1863, and which was very singularly entitled "An act granting the right of way to ditch and canal owners over the public lands, and for other purposes." Many locations were made under this statute, some of which were patented prior to May 10, 1872, and others afterward. The act of 1866 differed in two very essential particulars from subsequent legislation upon the same subject. These were: 1. That it did not mention end lines, and therefore imposed no duty on the locator to see that they were parallel; and 2. It declared that "the plat, survey, or description shall in no case cover more than one vein or lode, and no patent shall issue for more than one vein or lode, which shall be expressed in the patent issued": 14 U. S. Stats. at Large, sec. 3, p. 252; *Eureka case*, 4 Saw. 302; *Walrath v. Champion Min. Co.*, 63 Fed. Rep. 552. The length of the claim or location could not, by this statute, exceed two hundred feet "along the vein for each locator, with an additional claim for discovery to the discoverer of the lode, with the right to follow such vein to any depth with all its dips, variations, and angles, together with a reasonable quantity of surface for the working of the same, as fixed by local laws": 14 U. S. Stats. at Large, sec. 4, p. 252; *Lindley on Mines*, sec. 572. This statute did not, as did later ones, provide specifically for a location on each side of the middle of the vein or of its apex; and many locations were made under it in the belief that the description of the side lines was not material, and that the locator would have the right to follow the lode for the distance specified in the location, though it should not be found to be embraced within the side lines thereof. This belief proved to be a mistaken one, and a patentee under the act of 1866 has no more right than a patentee under the later statutes to any mineral out-

side of the boundaries specified in his patent, though it constitutes part of the lode therein mentioned: *Wolfley v. Lebanon*, 4 Colo. 112; *Johnson v. Buell*, 4 Colo. 557; *McCormick v. Farnes*, 2 Utah, 356; *Walrath v. Champion Min. Co.*, 63 Fed. Rep. 552; *Flagstaff Min. Co. v. Tarbet*, 98 U. S. 463.

Conveying or Diverging End Lines.—Under the act of 1866, the patentee was entitled to extralateral rights to the extent that he might follow the dip of his lode, though in so doing he passed beyond a plane drawn vertically beneath his side lines. He could not, however, pursue his lode beyond his end lines. As these lines were not required by statute to be parallel, nor indeed to run in any prescribed direction, there was doubt as to whether the patentee, in following the dip, had the right to continue up to a plane representing a continuation of his end lines projected beneath the surface of the earth when they were neither parallel, nor ran at right angles to his lode or location. Thus, many locations were made under the act of 1866, the end lines of which, if projected in the same direction beyond the side lines, converge on the one side and diverge on the other, and in which, when the dip was toward the diverging side, if it were held that the patentee had the right to mine up to the line so projected, it must follow that his rights upon the dip would greatly exceed in length the two hundred feet of lode allowed him by statute. The question is, perhaps, not finally settled, but the tendency of the adjudications is to affirm the right to follow the dip up to a plane which is in continuance of the end lines, whether it be on the converging or the diverging side: *Lindley on Mines*, secs. 574-576; *Eureka case*, 4 Saw. 302.

When the Act of 1866 was Repealed by the enactment of a subsequent statute upon the same subject, the repeal did not divest pre-existing rights. Persons then having pending applications for patents were entitled to continue such proceedings, and a patent issued thereon, though after the enactment of the statute of May 10, 1872, had precisely the same effect as if issued while the repealed statute remained in force: *Lindley on Mines*, sec. 604; *Eclipse etc. Min. Co. v. Spring*, 59 Cal. 304. The act of 1872 (17 U. S. Stats. at Large, 90), however, was in its terms applicable to prior as well as to subsequent locations. The purpose of this statute was not concealed by its title, for it was thereby designated as "An act to promote the development of the mining resources of the United States." By section 3 its provisions were extended to "the locators of all mining locations heretofore made, or which shall hereafter be made, on any mineral vein, lode, or ledge situated on the public domain." Under this statute the right of locators was extended so that they were entitled not only to a single lode, as under the act of 1866, but also to "all veins, lodes, or ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extending downward vertically, although such veins, lodes, or ledges may so far depart from the perpendicular in their course downward as to extend outside of the vertical side lines of said surface locations." If, therefore, though the location of a claim was made prior to 1872, its locator, after the enactment of the statute of that year, instituted

proceedings looking to the acquisition of a patent and complied with the statute then in force, the patent, when issued to him, had precisely the same effect as if the location itself had been made under the later statute, and the statute of 1866 could not be referred to for the purpose of extending or limiting the effect of the patent issued under the later act: *New Dunderberg Min. Co. v. Old*, 79 Fed. Rep. 598. On the other hand, patents issued under the act of 1866 were enlarged in their operation by the subsequent statute of 1872, so that they were no longer restricted to a single lode, but included all veins or lodes to which there was no adverse claim at the passage of the act, the top or apex of which was within the surface lines of the lands patented under the prior act: *Walrath v. Champion Min. Co.*, 63 Fed. Rep. 552; 72 Fed. Rep. 978.

Placer Claims.—On July 10, 1870, Congress amended its "Act granting rights of way to ditch and canal owners of the public lands and for other purposes," by providing, in section 12 thereof, as amended; "that claims usually called placers, including all forms of deposit, excepting veins of quartz or other rock in place, shall be subject to entry and patent under this act under like circumstances and conditions and upon similar proceedings as are provided for vein or lode claims": 16 U. S. Stats. at Large, 217. The form in which such claims might be located was not prescribed in the statute, nor was their area limited, except that no one of them should exceed "one hundred and sixty acres for any one person or association of persons," and the locations were required to conform to the United States surveys. This was the first statute enabling owners of placer claims to obtain evidence of title thereto from the United States. The statute of July 9, 1870, was repealed by that of May 10, 1872. This later statute also contained provisions respecting placer claims and proceedings for patents thereunder. If a vein or lode were known to exist within the boundaries of a placer claim, an application for a patent for such claim which did not include an application for the vein or lode was by the statute declared to be a conclusive declaration "that the claimant of the placer claim has no right of possession of the vein or lode claimed; but where the existence of a vein or lode in a placer claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof." The limit of a placer claim was by the latter statute fixed at twenty acres for each individual claimant, but an association of persons might be entitled to the same quantity as under the act of 1870. The description of placer claims subject to entry and patent as described in section 2329 of the present Revised Statutes is the same as that found in the statute of July 9, 1870.

A Patent Issued for a Placer Mining Claim Includes not only the surface of the ground, but all mineral vertically beneath it, except in so far as the statute has reserved rights in favor of the owners of lode claims. In the first place, there may be valid locations of those claims the surface of which is not included within the placer claim, but the dip of which does extend under such claim. Under such circumstances, it would seem that the locator of the lode was entitled, in the exercise of his extralateral rights, to follow the dip of his lode, though in so doing he should go vertically beneath the

surface of the placer claim: Colorado etc. Min. Co. v. Turck, 50 Fed. Rep. 888; 70 Fed. Rep. 294. There is by statute, as we have already shown, except in those cases in which the placer claimant has included in his application a claim for a known lode, excepted from the patent any known vein or lode. Notwithstanding the issuance of a patent to a placer claim, it may be shown by extrinsic evidence that there was within the limits of the lands patented when the application for the patent was filed a known lode, and, where this showing is made, the placer patent conveys no title to such lode. It is not sufficient to prove that a lode was claimed to exist, or even that there was a lode known to exist and having mineral of some value, but it must further be shown that the lode contained minerals in such quantity and of such quality and value as to justify, under the circumstances then existing, expenditures for the purpose of extracting them: Montana etc. Co. v. Dahl, 6 Mont. 131; Raunheim v. Dahl, 6 Mont. 167; Montana etc. Ry. Co. v. Migeon, 68 Fed. Rep. 811; Migeon v. Montana etc. Ry. Co., 77 Fed. Rep. 249; Sullivan v. Iron etc. Min. Co., 143 U. S. 431; Iron etc. Min. Co. v. Reynolds, 124 U. S. 374; United States v. Iron etc. Min. Co., 128 U. S. 673; Iron etc. Co. v. Mike etc. Co., 148 U. S. 394. The claimant under the placer patent is not concluded by the fact that a patent has subsequently issued for a lode existing within the boundaries of the lands patented to him. The subsequent proceedings under which the patent issued for the lode claim were ex parte in character, and the holder of a patent previously issued for a placer claim cannot be regarded as a party thereto, but after the two patents have issued, the question of their superiority, as it depends upon extrinsic facts not shown by the patents themselves, must be determined in any judicial proceedings in which the question of superiority is involved, from such competent evidence as the parties may be able to produce tending to show whether or not there was at the time of the application for the placer patent within the boundaries of the land applied for a lode known to the patentee and of such a character that he was not entitled thereto, unless he specially mentioned it in the application for his patent: Iron etc. Min. Co. v. Campbell, 135 U. S. 286. Whether the patentee of a placer claim has any extralateral rights is a question which, so far as we are aware, has not presented itself for consideration. We assume, however, from the language of section 2333 of the Revised Statutes that the holder of a placer patent is not entitled to any mineral or other deposit not within planes projected vertically beneath the boundaries of his claim, although it may be ascertained that the mineral exists in the form of a vein or lode to which he is entitled, and which, if located as such, might give the locator extralateral rights.

BENNETT v. NORTH COLORADO SPRINGS LAND AND IMPROVEMENT COMPANY.

[28 COLORADO, 473.]

COTENANCY—TAX SALES.—When the interests of several cotenants are assessed, neither is under obligation to pay the taxes due from the other, and, therefore, either may purchase the interest of the other at a tax sale thereof and assert any title acquired from such sale.

A TAX SALE MADE AT A TIME OR PLACE OTHER THAN THAT prescribed by law is void.

COLOR OF TITLE, WHAT IS.—A void tax deed taken in good faith may be sufficient to give color of title, as where it is executed by a proper officer, gives a correct description of the property, and contains the recitals essential and proper in tax deeds, and its invalidity arises from its showing that the sale was made at a time or place other than that authorized by law.

EVIDENCE—WAIVER OF OBJECTIONS.—If a certificate of an abstract company is offered in evidence for the purpose of showing the assessment of property and the payment of taxes thereon, and the opposing counsel thereupon say that they do not object "because the tax deeds themselves are not introduced, but for other reasons," this is a waiver of their right to subsequently complain because better evidence was not introduced.

Action to recover an undivided two-ninths of a tract of land with damages for withholding possession thereof. The defendant, the North Colorado Springs Land and Improvement Company, relied upon a tax deed executed by the county treasurer in July, 1881, and averred that it had been in the quiet, peaceable, and undisputed possession of the property from the date of the deed, and that it had for more than five successive years paid all taxes thereon. The defendants also relied upon a sale of two-ninths of the property for taxes made on the eighth day of July, 1878, and a tax deed issued pursuant to such sale on July 21, 1881, and upon the fact that the plaintiff had brought no action within five years from the delivery of the tax deed. The defendant company further pleaded that plaintiff, though knowing of the tax sale, took no steps to redeem therefrom, and had since paid no taxes. A patent to the land in controversy was issued in 1870, and the title under such patent was in the year 1877 held four-ninths thereof by Charles F. Miller, one-sixth by Henry F. Paul, one-sixth by Joseph Sharratt, one-ninth by Olive M. Oakes, and one-ninth by Hiram P. Bennett. On July 8, 1878, the whole tract was sold in payment of delinquent taxes to Joseph Sharratt. The officers having charge of the collection of taxes treated this sale as a payment by Sharratt upon his own interest and as a sale of the remaining five-sixths, and the certificate of sale was executed

accordingly. During the time allowed for redemption, various redemptions were made, leaving only a two-ninths interest unredeemed. For this latter interest a tax deed issued to Sharratt, July 21, 1881. This deed was substantially in the form prescribed by law, but was invalid because it disclosed that the sale took place at the office of the clerk and recorder of the county instead of at the office of the county treasurer. This tax deed was understood to affect the two-ninths interest held by Bennett and Oakes. The latter, who is the appellant in this action, was a lawyer who went in the year 1877 to Deadwood, Dakota, to engage in the practice of his profession. He made no arrangements whatever for the payment of the taxes. Two years later he returned to Colorado, and opened an office at Leadville. He then learned of the sale for taxes, but made no effort to redeem therefrom until December, 1889, and a year later he began this action of ejectment. The statute of limitations relied upon by defendant, constituting section 2924 of Mills' Annotated Statutes of Colorado, was as follows: "Sec. 2. Whenever a person having color of title, either by pre-emption or otherwise, as aforesaid, made in good faith to vacant and unoccupied land or mining claims, shall pay all taxes legally assessed thereon, or for improvements situate thereon, for five successive years, he or she shall be deemed and adjudged to be the legal owner of said vacant and unoccupied lands or mining claims, to the extent and according to the purport of his or her proper title or pre-emption. All persons holding under such taxpayer, by purchase, devise, or descent, before said five years shall have expired, and who shall continue to pay the taxes for the term aforesaid, shall be entitled to the benefit of this section; provided, however, that if any person having a better title or pre-emption to said vacant and unoccupied lands or mining claims shall, during the said term of five years, pay the taxes assessed on said lands, or mining claims, or improvements thereon, for any one or more years of the said term of five years, then, in that case, such taxpayer, his heirs and assigns, shall not be entitled to the benefit of this section." The judgment of the trial court was in favor of the defendant and the plaintiff appealed.

Kingsley and Bennett & Bennett, for the appellant.

Lunt, Armit & Brooks, and Wolcott & Vaile, for the appellee.

475 HAYT, C. J. The plaintiff has certainly been very negligent in asserting his claim to this land. From 1877 to 1889,

a period of twelve years, he neither paid taxes upon the property nor ⁴⁷⁶ did he make any arrangement to have the same paid, or make any claim whatever to the property, although during this entire period the purchaser at the tax sale and his successors in title were exercising acts of ownership over the premises.

The witness, Frank White, testifies that in the year 1889 he heard the plaintiff say that he was advised of the sale of the property for taxes before the time of redemption had expired, but that he did not have the money necessary to redeem, and he would, therefore, have to lose his title to it. These statements are denied by plaintiff, but under the findings of the district court we must assume the statements to be established. It is shown that it was only after the land had greatly appreciated in value, and after it had passed into the hands of bona fide purchasers, who had expended large sums of money in its improvement, that plaintiff sought to assert his claim. Therefore, at the beginning of this investigation, we are confronted with the lack of equity of plaintiff's demand.

It is claimed that as the purchaser at the tax sale (Sharratt) was, at the time, a tenant in common with plaintiff in this land, that the purchase inured to plaintiff's benefit. In support of this claim the opinion of Chancellor Kent, in the case of *Van Horne v. Fonda*, 5 Johns. Ch. 388, is strongly relied upon. That case was between two devisees from a common ancestor, who were in possession of land under an imperfect title, and it was held that one of these devisees could not buy up an outstanding title for his own exclusive benefit, but that such a purchase inured to the benefit of both upon an equal payment of the expenses. In the course of the opinion the learned chancellor took occasion to state: "I will not say, however, that one tenant in common may not, in any case, purchase in an outstanding title for his exclusive benefit."

This case was reviewed in the case of *Brittin v. Handy*, 20 Ark. 381, 73 Am. Dec. 497, and the latter has for many years been considered the leading case upon the subject. It is suggested in ⁴⁷⁷ the latter case that the mutual obligation spoken of by Chancellor Kent occurs only between such tenants in common as claim under the same instrument or by act of the parties, or by operation of law; but where this does not appear, in the absence of contract, tenants in common are under no greater legal obligation to protect one another's interests than would be required of strangers. In that case Brittin purchased under execution

the separate estate of his cotenant in the land. It appears that Brittin and Handy were not tenants in common under the same instrument, although both of their titles were derived from the same source, and it was held that such purchase by Brittin was valid. This view of the law was followed by the supreme court of Texas, in *Roberts v. Thorn*, 25 Tex. 728, 78 Am. Dec. 552, and in many subsequent cases, so that now it may be said to be established by the strong weight of authority: *Freeman on Cotenancy and Partition*, sec. 155; *Blackwell on Tax Titles*, secs. 566, 578, et seq.

The general rule is, that one cannot buy who is in a position of trust or confidence to the property, or upon whom a duty is cast not consistent with the character of a purchaser, and a tenant in common can only be held bound to protect the interest of his cotenant when some duty is cast upon him with reference to such interest; for instance, if it is shown to be his duty to pay all the taxes, he cannot allow the land to be sold for such taxes, and then avail himself of the tax title: *Dubois v. Campau*, 24 Mich. 360; *Williamson v. Russell*, 18 W. Va. 612. In the case before us the tax was levied upon undivided interests, and there was no obligation resting upon one tenant to pay the taxes of his associates. The interest of each was separately assessed, and Sharratt was not disqualified from taking the tax title: *Brittin v. Handy*, 20 Ark. 381; 73 Am. Dec. 497; *Freeman on Cotenancy and Partition*, sec. 155; *Blackwell on Tax Titles*, sec. 578, et seq.

We will now consider the effect of the statute of limitations and the payment of five successive years' taxes upon the interests in controversy. It is claimed that the tax deed under which the defendants claim is void and does not start ⁴⁷⁸ the statute running. The defects pointed out in the tax deed have reference to the time and place of sale. Some claim is also made that the tax deed purports to convey the entire property instead of a two-ninths interest therein, but we do not find this latter claim sustained by the instrument itself. The claim advanced with reference to the date of the sale is based upon the statute then in force, requiring such sales to be begun on the first Monday of July, whereas, by the recital in this deed, it is claimed that it appears the sale was not begun until the eighth day of July, this being the second Monday of the month. The deed also recites that the sale took place at the office of the clerk and recorder, while the statute requires the sale to be made at the county treasurer's office.

Under the decision in *Crisman v. Johnson*, 23 Colo. 264, ante, p. 224, such a tax is certainly void, but it does not follow that it is not sufficient to start the statute running. The phrase "color of title" in the statute was before this court for consideration in the case of *De Foresta v. Gast*, 20 Colo. 307, and that case may be cited as authority for the proposition that a "void deed, taken in good faith, may give sufficient color of title." Under the statute it was said, in that case: "The statute (when its conditions are complied with) is intended as a protection to a person holding in good faith under a mere colorable title—that is, under a title which is really no title."

Applying the rule announced in that case to the case at bar, and it is apparent that the tax deed gives color of title. It is executed by the proper officer; gives a correct description of the property conveyed; alleges that the same was subject to taxation for the year 1877; that the taxes were assessed and remained due and unpaid at the date of the sale; that the sale was held by virtue of the authority vested by law in the treasurer. It states that Joseph Sharratt bid one hundred and twenty-one dollars and fifty-five cents for the property, this being the whole amount of taxes, interest, and costs then due and remaining unpaid; that said sum was paid to the treasurer and the property ⁴⁷⁹ was stricken off to Sharratt at that price. It recites, also, that three years had elapsed between the sale and the execution of the deed, and the payment of all taxes by Sharratt accruing during this period. That such a deed furnishes sufficient color of title is well established by the great weight of authority.

To show the payment of taxes for upward of five consecutive years, the defendants offered certified statements taken from the books of the El Paso County Abstract Company. These certificates show the assessment of this property and the payment of taxes thereon by Sharratt and his successors for the years 1878, 1879, 1880, 1881, 1882, 1883, and 1884. It is now claimed that this certificate of the abstract company was not competent evidence to prove the payment of such taxes, but we think plaintiff has waived the right to urge this objection. In reference to these certified statements, the record affirmatively shows the following: "To the introduction of which plaintiff's counsel does not object because the tax books themselves are not introduced, but for other reasons." If objection had been made at that time to the character of this evidence, it would undoubtedly have been excluded; but counsel having encouraged its introduc-

tion in lieu of better evidence, because it was more accessible, they cannot now be heard to complain because better evidence was not offered. The certificate of the abstract company, showing, as it does, the payment of the taxes upon this property for more than five consecutive years, the statute of limitations which we are considering became a bar to plaintiff's action.

The judgment of the district court must, therefore, be affirmed.

COTENANCY—PURCHASING OUTSTANDING TITLE—TAX SALES.—A cotenant in possession cannot acquire title against his cotenant by purchasing a tax title to the common property: *Thompson v. McCorkle*, 136 Ind. 484; 43 Am. St. Rep. 834, and note. But he is entitled to be reimbursed for moneys expended in payment of taxes: *Stewart v. Stewart*, 90 Wis. 516; 48 Am. St. Rep. 949, and note. See, *Stevens v. Reynolds*, 143 Ind. 467; 52 Am. St. Rep. 422; *Franklin Min. Co. v O'Brien*, 22 Colo. 129; 55 Am. St. Rep. 118.

TAX SALES—MADE AT UNAUTHORIZED PLACE.—If it appears by a tax deed that the sale took place at the office of the county clerk when a statute requires it to be at the office of the county treasurer, such deed is void: *Crisman v. Johnson*, 23 Colo. 264; ante, p. 224, and note.

COLOR OF TITLE—WHAT IS.—A grantee of land has claim and color of title, where his deed, on its face, purports to convey the title. It is not necessary to show color of title, that the title, when traced back to its source, should prove to be an apparently legal and valid title: *Nelson v. Davidson*, 160 Ill. 254; 52 Am. St. Rep. 838, and note. See *Stewart v. Stewart*, 90 Wis. 516; 48 Am. St. Rep. 949.

TRIAL—OBJECTIONS TO EVIDENCE.—When specific objections are made to evidence, all objections not specified are waived: *St. Louis etc. Ry. Co. v. Hackett*, 58 Ark. 381; 41 Am. St. Rep. 105.

CASES
IN THE
SUPREME COURT
OF
GEORGIA.

SATILLA MANUFACTURING COMPANY v. CASON.

[38 GEORGIA, 14.]

MALICIOUS PROSECUTION—ARREST UNDER UN-AUTHORIZED WARRANT.—An affidavit and warrant under which a person is arrested, alleging that he “did commit the offense of trespass by digging up and grading a certain street or alley through the lands” of another, neither charges a criminal offense, nor the commission of any act amounting to a constituent element of such an offense, and cannot be made the basis of an action for malicious prosecution.

MALICIOUS PROSECUTION—VOID PROCEEDINGS, NOT BASIS FOR.—It is essential to the institution of an action for malicious prosecution that a prosecution upon some criminal charge should have been instituted and ended. If the proceeding instituted was void as wanting in any of the constituent elements of a proceeding authorized by law, then it was no prosecution, and cannot be the basis for an action.

MALICIOUS PROSECUTION.—An arrest under a void warrant, although the basis for an action for false imprisonment, cannot sustain an action for malicious prosecution.

Action for malicious prosecution by Cason, who alleged that he had been damaged by the Satilla Manufacturing Company in the sum of five thousand dollars; that, as marshal of the town of Waycross and acting under instruction of the chairman of the street committee thereof, he ordered the overseer of the chaingang to take convicts and work the streets at a designated place near the works of the defendant company; that the only work done was to put the streets in good condition for travel; that thereafter the defendant company procured a warrant for the arrest of plaintiff charging him with trespass “by digging up and grading a street or alley through the lands of the Satilla Manufacturing Company without their consent”; that he was ar-

rested under such warrant and gave bond for his appearance, and that no indictment was found against him; that after he was arrested and gave bond, the defendant withdrew said proceedings without his consent, and failed to further prosecute the case. A general demurrer interposed by the defendant was overruled, and it thereafter appealed.

Hitch & Myers, for the plaintiff in error.

J. C. McDonald and L. A. Wilson, for the defendant in error.

¹⁶ ATKINSON, J. 1. To enter upon the uninclosed lands of another without his consent and dig and grade a public street or alley is not a criminal offense under the law of this state, so far as we are advised or can ascertain, and is therefore not an indictable trespass. It gives to the person injured a right of action ¹⁷ civilly, but, upon proof of such facts, no conviction could be had for a crime or misdemeanor; and hence an affidavit upon which a warrant issued for the apprehension of a given person, which did not allege more than that such person committed a trespass "by digging up and grading a certain street or alley through the lands" of the person making the same, neither charged the person who was alleged to have committed the act with the violation of a public law involving the commission of an indictable offense, nor with the commission of any act amounting to a constituent element of such an offense. A warrant based upon such an affidavit, commanding the apprehension of the person so accused, was void altogether, was a mere "brutum fulmen," and the two combined did not together amount to the institution of a criminal prosecution against the person against whom it was directed.

2. It is a prime requisite to the institution of an action for malicious prosecution that a prosecution should have been instituted and ended; that the person alleging injury should have been prosecuted upon some criminal charge. Code, section 2982, which gives the right of action upon which the plaintiff bases his right to recover in the present case, limits the right to sue to criminal prosecutions maliciously instituted; and hence it follows that if no criminal prosecution was in fact instituted, then no action would lie. If the proceeding instituted was void in toto as wanting in any of the constituent elements of a proceeding authorized by law, then it was no prosecution. In *Frierson v. Hewitt*, 2 Hill (S. C.), 499, the distinction between malicious prosecutions proper, and those which bear only a resemblance to

such proceedings, is very clearly stated as follows: "The indictment must charge a crime; and then the action is maintainable per se on showing a want of probable cause. . . . There is another class of cases which are popularly called actions for malicious prosecution, but they are misnamed; they are actions on the case in which both a scienter and a ¹⁸ per quod must be laid and proved. I allude now: 1. To actions for false and malicious prosecutions for a mere misdemeanor, involving no moral turpitude; 2. To an abuse of judicial process, by procuring a man to be indicted as for a crime, when it is a mere trespass; 3. Malicious search warrants." Under the provisions of our code, the institution of a prosecution for a misdemeanor, or the suing of a search warrant, if done maliciously, may amount to a criminal prosecution, and may afford a sufficient basis for the institution of suit as for a malicious prosecution, because our code in terms provides that a total want of probable cause is a circumstance from which malice may be implied, and in each of these instances a warrant for the apprehension of the person accused may lawfully issue, but not so with a mere nonindictable trespass. In such a case, a warrant could no more lawfully issue than if one were accused of the nonpayment of a promissory note when it became due. In either case, if an affidavit were made and a warrant issued, it would be wholly without authority or color of law, and therefore could in no view amount to a prosecution. "It is a prosecution to swear an information in consequence of which a warrant is issued for the plaintiff's arrest, if the information contains a statement that the informer believes the plaintiff to have committed an offense, but not otherwise": Stephens on Malicious Prosecution, 7.

The proceeding in the present case, having been instituted wholly without warrant or authority of law, cannot be the basis of an action as for a criminal prosecution maliciously instituted and carried on. If the action had been for false imprisonment in consequence of the illegal action of the defendants in the present case and the declaration framed to that end, it might have been upheld; but in the present case the court erred in not sustaining a general demurrer to the declaration, and its judgment is accordingly reversed.

MALICIOUS PROSECUTION—ESSENTIAL ELEMENTS OF OFFENSE—ARREST ON NONCRIMINAL CHARGE.—Arrest and imprisonment of a person on a charge which does not constitute a crime is not malicious prosecution: *Krause v. Spiegel*, 94 Cal. 370; 28 Am. St. Rep. 137, and note. See monographic note to *Ross v.*

Hixon, 26 Am. St. Rep. 127-164, on the malicious prosecution of criminal charges. Three things must be shown to maintain an action for malicious prosecution: the want of probable cause, the existence of malice, and that the prosecution had ended when the action was commenced: Note to Antcliff v. June, 21 Am. St. Rep. 546.

FALSE IMPRISONMENT.—If an imprisonment is under legal process, an action for false imprisonment cannot be sustained, and the remedy, if any exists, is by an action for malicious prosecution: Rich v. McInerney, 103 Ala. 345; 49 Am. St. Rep. 32, and note. See, also, Krause v. Spiegel, 94 Cal. 370; 23 Am. St. Rep. 137, where it is held that a person arrested and imprisoned on a charge of slander had a cause of action for false imprisonment, but not for malicious prosecution.

PAUSE v. CITY OF ATLANTA.

[98 GEORGIA, 92.]

ESTATES—LEASEHOLD—TAKING FOR PUBLIC USE.—A leasehold interest in premises for a definite term is property within the meaning of a constitutional provision prohibiting the taking or damaging of private property for public purposes without just and adequate compensation being first paid.

ESTATES—LEASEHOLD—DAMAGES FROM PUBLIC IMPROVEMENT.—A holder of a leasehold has such an interest in the premises as enables him to maintain an action for damages resulting to his estate, in consequence of the construction of a duly authorized public improvement, whether such damage results from the negligence of the public authorities, or otherwise.

MUNICIPAL CORPORATIONS—DAMAGES FROM PUBLIC IMPROVEMENTS.—If the property of an adjacent lot or lease holder is directly and permanently injured by a public improvement constructed in the street by municipal authority, he may maintain an action to recover the damages resulting to him, therefrom.

MUNICIPAL CORPORATIONS—MEASURE OF DAMAGES TO LEASEHOLD FROM PUBLIC IMPROVEMENT.—If according to a plan of a proposed public improvement in a street, its completion would result either in the total exclusion of a leaseholder from his premises, or would make them so inconvenient as to render them valueless to him for the purpose for which they were leased, he may properly abandon his lease and vacate the premises, whenever, in the execution of the projected plan of construction, the work has so far progressed as virtually to destroy the lease by preventing the tenant from enjoying his estate. He is then entitled to recover from the municipal authorities, the market value of the premises for rent for the unexpired term of the lease. In such case neither the profits of the business conducted on the premises, nor the cost to the tenant of fixtures and improvements placed thereon, nor the cost of articles purchased for the purpose of enabling the lessee to conduct the business, nor the diminution in value of such fixtures, improvements, or articles such as are removed by the lessee of the premises can be recovered as damages; but the increased value of the premises for rent, in consequence of the putting in of such fixtures and improvements, may properly be considered in computing the damages to the leasehold estate.

MUNICIPAL CORPORATION—DAMAGES TO LEASEHOLD FROM PUBLIC IMPROVEMENTS—EVIDENCE.—A leaseholder who has been compelled to abandon his premises by reason of their

being rendered valueless for business purposes for which they were leased, by public improvement constructed in the street adjoining them, is entitled to recover from the municipality the market value of the leased premises for rent for the unexpired term of the lease. In such case the profits of the business cannot be recovered by way of damages; but evidence that the business, was profitable is admissible to show the value of the premises for rent. On the other hand, evidence of an option to extend the lease for two years upon the expiration of the original term, at the mutual agreement of the parties to the lease, is not admissible to enable the tenant to recover damages to the rental value of the premises after the expiration of the original term.

J. C. Reed and M. Foote, Jr., for the plaintiff.

J. A. Anderson and F. Colville, for the defendant.

²⁵ ATKINSON, J. The plaintiff occupied certain premises in the city of Atlanta, which were used by her in the business of keeping a restaurant and bar, and selling fish and oysters. She occupied the premises under a lease at a stipulated monthly rental for an agreed term of three years, and upon an option, by mutual agreement of the lessor and lessee, to extend the same to a term of five years. Her place of business was well located and properly fitted up at considerable expense. While engaged in the conduct of this business under the lease in question, the municipal authorities of the city of Atlanta commenced the construction of a certain bridge, in the building of ²⁶ which, under the plan adopted, the entrance to plaintiff's place of business would be and was in fact so far obstructed as practically to cut her off from the ordinary means of access to her place of business, which she had previously enjoyed, and, in addition to this, cut off the light and air from her place of business, so as to render her premises practically valueless for the purposes for which they were leased. Before the day upon which the door of her place of business was actually obstructed by the progress of the contemplated work, her business, in consequence of the obstruction to the entrance to her restaurant, became so unprofitable that she was compelled to abandon it, and to surrender the premises, in consequence of which she sustained damage. For the injuries thus sustained, she brought an action, and upon the introduction of evidence, which, if admitted, might have justified the jury in finding the facts above stated to be true, she was nonsuited upon the ground that she had shown no right of action against the city. In addition to the question made upon the motion for nonsuit, the plaintiff offered to prove that she had made certain improvements upon the premises at a stated ex-

of Georgia, which is now under discussion, have been construed, the rule has been stated, that for consequential damages traceable to the public, and which injuriously affect the property of the citizen, there may be a recovery, as distinguishable from those injuries which affect only the sensibilities or the business of the individual. Accordingly, the supreme court of Illinois, in construing a constitutional provision of force in that state similar to the one under consideration, pronounced as follows: "While it is clear that the present constitution was intended to afford redress in a certain class of cases for which there was no remedy under the constitution, yet we think it is equally clear that it was not intended to reach every possible injury that might be occasioned by a public improvement. There are certain injuries which are necessarily incident to the ownership of property in towns or cities, which directly impair the value of private property, for which the law does not, and has never afforded any relief. For instance, the building of a jail, police station, or the like will generally cause a direct depreciation in the value of neighboring property, yet it is clearly a case of *damnum absque injuria*. So as to an obstruction in a public street—if it does not practically affect the use or enjoyment of neighboring property, and thereby impair its value, no action will lie. In all cases, to warrant a recovery it must appear there has been some direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property, and which gives to it an additional value, and that by reason of such disturbance he has sustained a special damage with respect to his property, in excess of that sustained by the public generally. ¹⁰⁰ In the absence of any statutory or constitutional provisions on the subject, the common law affords redress in all cases, and we have no doubt that it was the intention of the framers of the present constitution to require compensation to be made in all cases where, but for some legislative enactment, an action would lie by the common law": *Rigney v. Chicago*, 102 Ill. 64-80. This rule seems to have been the one recognized and adopted in the English courts where damages are awarded in favor of a property owner where property has been "injuriously affected" by the construction of a public improvement, which term seems to have been recognized as an equivalent of the expression "damaged," as used in our constitution: See 2 Best & Smith, 605; *Beckitt v. Midland Ry. Co.*, L. R. 1 Com. P. 241; on appeal, L. R. 3 Com. P. 82; *McCarthy v. Metropolitan etc. Works*, L. R. 7 Com. P.

508; *Hall v. Mayor of Bristol*, L. R. 2 Com. P. 322; *East & West India Docks v. Gattke*, 3 McN. & G. 155. The word "damage" embraces more than the mere physical taking of property, and is not restricted to cases where the owner is entitled to recover as for a tort at common law: *Reardon v. San Francisco*, 66 Cal. 492. It seems that this language is intended to cover all cases in which, even in the proper prosecution of a public work or purpose, the right of a person in property or the property itself is in a pecuniary way injuriously affected: *Gulf etc. Ry. Co. v. Fuller*, 63 Tex. 467; *Gottschalk v. Chicago etc. R. R. Co.*, 14 Neb. 550; *Hot Springs R. R. Co. v. Williamson*, 45 Ark. 429; *Atlanta v. Green*, 67 Ga. 386; *Denver v. Bayer*, 7 Colo. 113; *Denver Circle Ry. Co. v. Nestor*, 10 Colo. 403; *Mason v. Harpers Ferry Bridge Co.*, 17 W. Va. 396. The damages, therefore, that an individual may recover for injuries to his property need not necessarily be caused by acts amounting to a trespass, or by an actual physical invasion of his real estate; but if his property be depreciated in value by his being deprived of some right of user or enjoyment growing out of and appurtenant to his estate as the direct consequence of the construction and use of any public improvement, his right of action is complete, and he may recover to the extent of the injury sustained: *Chicago etc. R. R. Co. v. Ayers*, 106 Ill. 511; *East St. Louis v. O'Flynn*, 19 Ill. App. 101 66. Accordingly it has been held that interfering with access to premises, by impeding or rendering difficult ingress or egress, is such a taking and damaging as entitles the party injured to compensation under a provision for compensation where property is damaged: 22 Am. & Eng. Cor. Cas. 393; *Cooley's Constitutional Limitations*, 690, note 3, and cases there cited. Compensation has been awarded for the laying of a railroad track in a street, the fee of which the abutter does not own: *Campbell v. Metropolitan Street R. R. Co.*, 82 Ga. 321. For the laying of a cable road by the side of a horse railroad: *Cooley's Constitutional Limitations*, 690, note 3. The rule seems to be deducible from the decisions of the courts of other states, construing constitutional provisions similar to our own, that if the owner of property, because of the permanent physical improvement itself, suffers damages by reason of the permanent diminution in the value of his property or estate, as distinguished from mere personal inconvenience, he has a right of action for such damage; nor is it material whether the property damaged abuts directly upon the improvement, or is distant therefrom. In the case of *McCarthy*

v. Metropolitan Board of Works, L. R. 7 Com. P. 508, the plaintiff resided and carried on business as a dealer in lime, brick, sand, ballast, etc., on premises near a dock known as Whitefriars dock, which was a public dock on the Thames. The dock was separated from plaintiff's premises by a public street twenty feet wide, and the distance from this street to the river along the dock was three hundred and fifty-two feet. The dock was largely used by the plaintiff in the way of his business, but he had no right or easement in the dock other than as one of the public, nor was there appurtenant or otherwise belonging to his premises any other right or privilege in or to the dock. By reason of its proximity to the plaintiff's premises and the access thereby afforded to and from the Thames, the premises were rendered more valuable to sell or occupy with reference to the uses to which any owner might put them. ¹⁰² In the execution of the works authorized by the Thames embankment acts, a solid embankment was carried along the foreshore of the Thames, thus permanently stopping up and destroying Whitefriars dock. By reason thereof access along the dock from the plaintiff's premises to and from the Thames was prevented, and his premises were permanently damaged and diminished in value. Plaintiff recovered judgment in the court of common pleas, which held his premises injuriously affected; and this decision was afterward affirmed by the exchequer chamber and house of lords: See *Caledonia Ry. Co. v. Walker*, L. R. 7 App. Cas. 259; *Lewis on Eminent Domain*, sec. 227, p. 306, note 3. See other English cases there cited. In *Rigney v. Chicago*, 102 Ill. 64, it appeared that Rigney, the plaintiff, owned an improved lot on one street, which street was intersected at right angles by another at a point two hundred and twenty feet distant from the plaintiff's property. The city built on the intersecting street, over the street upon which plaintiff's property was situated, a viaduct, so as to entirely prevent access to the intersecting street from the street upon which plaintiff's property was situated, except by stairs. The evidence showed that the intersecting street was an important thoroughfare upon which horse-car lines were operated, affording communication with all parts of the city. No change whatever was made in the street upon which the property of plaintiff abutted, either in front of his property, or elsewhere, but, as the result of the construction of the viaduct, and cutting off access to the intersecting street, plaintiff's property was damaged. The court there held, under a constitutional provision

similar to ours, that the property was damaged within the meaning of the constitution. Referring to these cases, Lewis on Eminent Domain says: "They seem to settle the doctrine that an obstruction or interference with a public street or way need not necessarily be in front of or contiguous to the property claimed to be affected thereby, in order to authorize a recovery. It is sufficient if it is such an obstruction or interference as ¹⁰³ produces a diminution in the value of the property, as distinguished from mere personal inconvenience to the owner": Lewis on Eminent Domain, sec. 227, p. 307; citing Caledonian Ry. Co. v. Walker, L. R. 7 App. Cas. 259.

In considering the questions made in this case, a distinction should be borne in mind between those cases where one seeks to recover because of the appropriation by the public to the public use of private property, and damages to one's property sustained in consequence of the construction of such public improvement, and that other class of cases in which, though one's property be neither appropriated nor damaged, yet in consequence of the construction of such an improvement one suffers damage resulting from personal inconvenience, and consequent damage in the conduct of one's business. In the former case the right of compensation is a matter of principle; the amount of damage, a mere matter of degree. However slight or however great one's damage may be, he is nevertheless entitled to compensation. In the latter class of cases, something more must appear than mere damage or inconvenience. It must be made to appear that in the construction of such an improvement the municipal authorities have been guilty of negligence, omission of duty, or negligent commission of an act authorized by law, in order to authorize a recovery. In the one case the constitution allows compensation because of the damage to property; in the other case the right of recovery rests upon the general law and depends upon the negligence of the offending corporation. Ordinarily, municipal authorities judge of the means by which a contemplated public improvement will be accomplished, and if the municipal authorities adopt such means as in their judgment are best adapted to the accomplishment of the proposed purpose, they will not be liable, unless, in the execution of that purpose, by some act of negligence they inflict injury to the person, property, or business of an individual in which the general public does not share. These principles ¹⁰⁴ are clearly deducible from the three Georgia cases to which reference has

hereinbefore first been made, and they seem to be borne out by the current of authorities elsewhere.

In determining the question now submitted for our consideration, it is not necessary for us to state the rule which will be adopted by this court where the obstruction is so remote from the property of the person claiming to be injured thereby as to render it doubtful whether the damage complained of may be fairly attributed to the obstruction itself, or to other and independent causes. In the present case the property damaged in consequence of the public improvement was directly affected by the improvement itself; and hence we hold, that inasmuch as the plaintiff had a property in the thing injured, she is entitled, under the constitutional provision of force in this state, to which we have hereinbefore referred, to recover the damage sustained by her.

3. It was insisted in the present case that the plaintiff was not entitled to recover, because she abandoned her lease before access to her property was actually cut off by the projected public improvement. We do not think this is a good reply to her demand; she had an existing estate in the property, and when it became manifest to her that, according to the plan of the proposed public improvement, its completion would result either in her total exclusion from her premises, or make the same so inconvenient as to render it valueless to her for the purposes for which it was leased, she could properly abandon her lease, and vacate the premises, whenever in the execution of the projected plan of construction the work had so far progressed as virtually to destroy her lease by preventing the enjoyment of her estate, and a mere surrender by her under such circumstances will not be deemed a voluntary abandonment of the premises; she would be nevertheless entitled to recover for her unexpired time the market value of her premises for rent.

¹⁰³ 4. The measure of her damage is the injury to her property which is injuriously affected by the public improvement; in arriving at that damage, neither the profits in the business conducted on the premises, nor the cost to the tenant of fixtures and improvements placed therein, nor the articles purchased for the purpose of enabling the lessee to conduct the business, nor diminution in the value of fixtures, improvements, or articles such as are removed by the lessee, can be recovered as damages; but the increased value of the premises for rent in consequence of the putting in of such fixtures and improvements may prop-

erly be considered in computing the damages to the leasehold estate.

5. In such a case, the profits of the business are not recoverable by way of damages, but evidence that the business was profitable is admissible to illustrate and throw light upon the value of the premises for rent.

6. Nor was it competent upon the part of the leaseholder to prove that she had an option upon the premises for a term of years longer than three, it appearing that the option was not to be exercised at her will alone, but was dependent likewise upon the concurrence of the landlord. Such testimony would be irrelevant, as, under the peculiar terms of the option claimed in the present case, the leaseholder acquired no interest, but only a privilege of making a new contract with her landlord at the termination of her lease, the new contract being dependent upon the consent of the landlord; and this she would have had the right to have done with or without the alleged option. It having, therefore, no market value, it ought not to have been considered, and was properly rejected by the court as irrelevant.

Upon the main questions in the case, the court erred in directing a nonsuit, and the judgment is reversed.

MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—DAMAGE TO ABUTTING OWNERS.—A municipal corporation is liable in damages for an injury to abutting property caused by its building a viaduct in a street, thus obstructing ingress and egress to the premises: *Pueblo v. Strait*, 20 Colo. 18; 46 Am. St. Rep. 273, and note. Also, see *White v. Northwestern etc. Ry. Co.*, 113 N. C. 610; 37 Am. St. Rep. 639, and note. See extended note to *O'Brien v. Philadelphia*, 30 Am. St. Rep. 840-845, as to what constitutes damage.

MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—DAMAGE TO ABUTTING PROPERTY—MEASURE OF DAMAGES.—The right of recovery should turn in each case on the diminution in the pecuniary or market value of the property caused by the improvement: Extended note to *O'Brien v. Philadelphia*, 30 Am. St. Rep. 845. The damages recoverable include all elements of damage already existing, but do not include rights of action which are yet inchoate: *Clark v. Philadelphia*, 171 Pa. St. 80; 50 Am. St. Rep. 790.

OLIVER v. MACON HARDWARE COMPANY.

[98 GEORGIA, 249.]

LABORERS—CLERKS AS—LIENS AND EXEMPTIONS.—

"Primarily, a clerk in a mercantile establishment is not a "laborer", in the sense in which that word is used in section 1974 of the Georgia code, even though the proper discharge of his duties may include the performance of some amount of manual labor. If the contract of employment contemplated that the clerk's services were to consist mainly of work requiring mental skill, or business capacity, and involving the exercise of his intellectual faculties, rather than work the doing of which properly would depend upon a mere physical power to perform ordinary manual labor, he would not be a "laborer." If, on the other hand, the work which the contract required the clerk to do was, in the main, to be the performance of such labor as that last above indicated, he would be a laborer. In any given case, the question whether or not a clerk is entitled, as a laborer, to enforce a summary lien against the property of his employer, must be determined with reference to its own particular facts and circumstances."

LABORERS—CLERK AS—PLEADING.—"Although the intervention filed in the present case alleged in general terms that the intervenor was a clerk, that the amount he claimed was due him for services and labor performed as a clerk, and that as such clerk he performed manual labor, yet, as it failed by other appropriate allegations to show to which of the classes above indicated he belonged, it was bad for uncertainty and properly dismissed on demurrer."

LABORERS—CLERK AS—GENERALL^y. A clerk in a mercantile establishment is not a "laborer" within the meaning of lien and exemption laws, even though, in the discharge of his duties, he is necessarily called upon to perform a considerable amount of manual labor. Whether such clerk is entitled, as a "laborer," to enforce a summary lien against the property of his employer must be determined by the peculiar facts and circumstances of each particular case.

A. Proudfit, for the plaintiff.

Dessau & Hodges, for the defendant.

²⁴⁹ LUMPKIN, J. Some confusion has arisen in the decisions of this court with reference to the question whether or not a "clerk" employed in a store, office, or other place of business, is a "laborer" within the meaning of sections 1974 and 3554 ²⁵⁰ of the code—the former giving "laborers" a general lien for their labor upon the property of their employers, and the latter exempting the wages of "laborers" from the process of garnishment.

In *Butler v. Clark*, 46 Ga. 466, the question arose as to whether the wages of one employed in a mill as "receiving and shipping clerk," and who "performed any other duties required of him" by his employer, were subject to garnishment. In dealing with the case, this employé was treated as "a hired workman," and

accordingly adjudged to be a laborer within the meaning of the statute.

In *Claghorn v. Saussey*, 51 Ga. 576, the monthly wages of a "forwarding clerk" in the employment of a railway company were held not to be subject to the process of garnishment. It was the duty of that clerk to attend daily to the forwarding of goods, and to render other services which necessarily required the performance of a considerable amount of manual labor.

This case is cited in *Oliver v. Boehm*, 63 Ga. 172, where it was decided that a person "employed as clerk, bartender, and boy of all work, to labor in and about a retail grocery and liquor store," was a laborer entitled to the lien provided for by section 1974 of the code. The scope of this boy's employment seems to indicate that the greater part of his work consisted of manual labor, rather than of services requiring mental or intellectual skill and capacity. Indeed, in *Richardson v. Langston*, 68 Ga. 658, Justice Crawford, in referring to *Oliver v. Boehm*, 63 Ga. 172, said "he specifically set out at length the actual manual labor which he performed." The learned justice doubtless referred to the record of the case, as only the headnote of the decision is reported in 63 Georgia. In *Richardson v. Langston*, 68 Ga. 658, the court ruled that an affidavit to foreclose a laborer's lien, in which it was alleged that the defendants, merchants selling dry goods and groceries, were ²⁵¹ indebted to deponent "for services rendered as clerk, laborer, and general service in said store," was not demurrable as not sufficiently setting out the fact that the plaintiff was a laborer. The opinion was written by Justice Crawford, who dissented from the judgment. We make the following extract from his comments on the case: "I do not understand that clerks, or persons doing general service, although they may labor, are therefore laborers in legal contemplation. If they are to be included in the general term 'laborers,' then I see no limit to the exercise of this extraordinary right of having execution on oath, by all agents and employes, such as cashiers, tellers, and bookkeepers of banks, secretaries, treasurers, bookkeepers, salesmen, and superintendents of manufacturing companies, as well as all the officials in railroads below the president, whether in the offices or on the roads. To enlarge upon class legislation by implication should not be the policy of courts, and especially so where ex parte summary remedies are allowed."

We will next notice the case of *Hinton v. Goode*, 73 Ga. 233, in which it was decided that: "One who is employed merely to labor as clerk in a store is not such a laborer as is contemplated by section 1974 of the code, giving a lien to a laborer on the property of his employer." Justice Blandford, who delivered the opinion of the court, said: "Laborers, as used in the statute, mean what were generally and universally known as laborers at the time of the passage of the act. A laborer is one who works at a toilsome occupation—a man who does work requiring little skill, as distinguished from an artisan—sometimes called a laboring man: Webster's Dictionary. Clerks, agents, cashiers of banks, and all that class of employes, whose employment is associated with mental labor and skill, were not considered laborers, and were not intended by the statute to be embraced therein as laborers, so as to have a lien for their wages. And this is the effect of the previous rulings of this court."

²⁵² In *Ricks v. Redwine*, 73 Ga. 273, it was held that: "A clerk employed in a store or other establishment, unless he performs manual labor, is not a laborer entitled to have a lien upon his employer's property which can be summarily enforced." In that case, Justice Hall observed that all the former cases on the subject were reviewed in the case of *Hinton v. Goode*, 73 Ga. 233.

In *Lamar v. Chisholm*, 77 Ga. 306, it was held that the wages of a clerk and bookkeeper were not subject to garnishment, citing *Smith v. Johnson*, 71 Ga. 748, which was a case involving the right to garnish the wages of a railroad clerk. Then follows the case of *Abrahams v. Anderson*, 80 Ga. 570, 12 Am. St. Rep. 274, which is substantially on the same line, and cites a number of cases, including several of those above mentioned.

This brings us to the case of *Briscoe v. Montgomery*, 93 Ga. 602, 44 Am. St. Rep. 192, holding that a "commercial traveler" was not a day laborer whose wages were exempt from the process of garnishment. In the course of a very brief discussion of that case, the writer remarked: "It is obvious that, in the discharge of his duties, a clerk and bookkeeper must necessarily perform a considerable amount of manual labor." It was not necessary, however, in that case, to go to the bottom of the subject with which we are now dealing, and this accounts for the evident looseness of the expression last above quoted.

We think all the cases previously decided can be reconciled and harmonized by adopting the line indicated in the first head-

note of the present case. It states the idea about as clearly as we can express it. Every human being who follows any legitimate employment, or discharges the duties of any office, is, in a very broad sense, a "laborer." The President of the United States, the governor of this state, and the justices of this court are all laboring men, in the sense that they do a great deal of hard work, much of which is, indeed, attended with physical and muscular ²⁵³ exertion; but, at the same time, they cannot properly be termed "manual laborers," either in the popular sense in which these words are used and understood, or in the sense in which the term "laborers" was employed in the statutes under consideration. The legislature manifestly had reference to the work in which such "laborers" were engaged, rather than to the particular designation by which they were usually distinguished one from the other.

In determining whether a particular clerk, or other employé, is really a "laborer," the character of the work he does must be taken into consideration. In other words, he must be classified—not according to the arbitrary designation given to his calling, but with reference to the character of the services required of him by his employer. The headnote indicates the rule to be followed in assigning him to that class to which he rightfully belongs.

2. From the foregoing, it follows that an intervention filed in an equitable proceeding containing only the allegations set forth in the second headnote was bad for uncertainty, because it entirely failed, by other appropriate allegations, to show that the intervenor belonged to that class of "clerks" entitled to liens as laborers.

Judgment affirmed.

LABORERS—WHO ARE.—Laborers are those who perform with their own hands the contract they make with their employers, and not those who are mere contractors to have work done, and whose compensation is the profit realized on the transaction: *Johnston v. Barrilla*, 27 Or. 251; 50 Am. St. Rep. 717, and note. One employed as a "commercial traveler" to sell goods for his employer, though employed and paid for his services by the day, is not a "day laborer" within the meaning of the statute, and his wages are, therefore, not exempt from the process of garnishment: *Briscoe v. Montgomery*, 93 Ga. 602; 44 Am. St. Rep. 192, and note. See, also, *Farinhold v. Luckhard*, 90 Va. 936; 44 Am. St. Rep. 953.

Laborers, Who Are.*

Definitions.—The meaning of the word "laborer," as employed in lien and exemption laws, has been variously defined by different

* REFERENCES TO MONOGRAPHIC NOTES.

Laborers who are: 91 Am. Dec. 419, 420. Architects whether laborers, 32 Am. Rep. 264, 267.

courts of last resort as follows: "The common and ordinary signification of the term 'labor' accords, we think, with the definition given by the best lexicographers, and is understood to be physical toil. And the term 'laborer' is ordinarily employed to denote one who subsists by physical toil, in distinction from one who subsists by professional skill. The exception of claims for labor would not, therefore, ordinarily be understood to embrace the services of the clergyman, physician, lawyer, commission merchant, or salaried officer, agent, railroad or other contractors, but would be confined to claims arising out of services where physical toil was the main ingredient, although directed and made more valuable by mechanical skill, and we are constrained to think that the term 'labor' was used in its primary and popular signification, restricted to claims arising from physical toil": *Weymouth v. Sanborn*, 43 N. H. 171; 80 Am. Dec. 144. "By 'laborers' we mean those who perform with their own hands the contract they make with their employer; and where the nature of the work contracted for is of a nature to require helpers of the chief workman, and he employs his helpers, he is to be considered as authorized to do so by the proprietor, and the wages earned by such helpers are as much within the protection of the statute as the wages of the chief workman himself": *Selder's Appeal*, 46 Pa. St. 57. "The act meant to favor those who earned their money by the sweat of their own brows, not those who were contractors to have the work done, and whose compensation was the profit they would realize from the transaction." *Wentroth's Appeal*, 82 Pa. St. 469. The language of these Pennsylvania cases was adopted in *Johnston v. Barrills*, 27 Or. 251; 50 Am. St. Rep. 717. In defining the word "laborer" within the meaning of a statute giving "laborers, servants, and apprentices" a lien for the money due them for their "services," the court in *Wakefield v. Fargo*, 80 N. Y. 218-217, said: "It is plain, we think, that the services referred to are menial or manual services—that he who performs them must be of a class whose members usually look to the reward of a day's labor, or service, for immediate or present support, from whom the company does not expect credit, and to whom its future ability to pay is of no consequence; one who is responsible for no independent action, but who does a day's work or a stated job under the direction of a superior." In speaking of a statute exempting the wages of a "laboring man" from garnishment, the court, in *Wildner v. Ferguson*, 42 Minn. 112, 18 Am. St. Rep. 495, 497, said: "We do not think that the legislature intended the exemption to operate in favor of any but those who are laboring men and women in the sense that their work is manual. Persons of that class usually look to a day's labor for immediate or present support, and such persons are in need of the exemption more than any others." "The statute does not define the labor it is meant to protect, and it might be difficult to construct a perfectly satisfactory definition, but there can be no doubt that wages earned by the personal, manual labor of the debtor are under the cover of the statute." This rule was here applied to a coal miner, who, by his own labor, mined coal by the ton, and who employed a common laborer to assist him, although the superior skill

of the former would entitle him to greater compensation than the latter: *Pennsylvania Coal Co. v. Oostello*, 33 Pa. St. 241. "The word 'laborer' as used in such acts must be understood in its ordinary sense": *Taylor v. Hathway*, 29 Ark. 597. "Common sense rejects an interpretation which places the operatives in a factory, or the laborers in a mine, and the person whose duties relate to the conduct and superintendence of their work, under the same designation. In one sense, they are all servants or laborers, because they render services or perform labor. But such a construction would include the officers of a company, its attorney and counsellor, and all other persons who should perform any sort of service for it. That construction has been uniformly rejected. Who, then, are laborers and servants? A proper answer to that question is, that they are persons who, in common parlance and according to the general understanding of men, fall under that appellation in enumerating the different classes of persons employed by a corporation or person." *Dean v. De Wolf*, 16 Hun. 186; affirmed 82 N. Y. 626. The laborer whose wages are exempt from garnishment is "one who subsists by physical toil in distinction from one who subsists by professional skill. Where physical toil is the main ingredient of the services rendered, although directed and made more valuable by skill, the person performing them is a laborer within the meaning of the statute": *Williams v. Link*, 64 Miss. 641-643. Laborers are that "class who obtain their living by coarse manual labor, as distinguished from professional men; men who work with their hands rather than their heads." If the manual labor required is an incident, rather than the principal, of the services rendered, the person rendering them is not a laborer: *Ericson v. Brown*, 38 Barb. 390. "We think it is safe to say that the word 'laborer,' when used in its ordinary and usual acceptation carries with it the idea of actual physical and manual exertion and toil, and is used to denote that class of persons, who literally earn their bread by the sweat of their brows, and who perform with their own hands, at the cost of considerable physical labor, the contracts made with their employers": *Farinholt v. Luckhard*, 90 Va. 936; 44 Am. St. Rep. 953.

Within the Meaning of Exemption Laws.—The wages of a person engaged as a clerk in a mercantile store are exempt from garnishment under statutes exempting laborers' wages: *Williams v. Link*, 64 Miss. 641; *Butler v. Clark*, 46 Ga. 406; *Lamar v. Chisholm*, 77 Ga. 303. Thus the monthly wages of a forwarding clerk in the employ of a railroad company, whose duty it is to attend daily to the forwarding of goods, to report daily when the drays commence work and when the day's labor is terminated, the company reserving the right to discharge him at any time, are not subject to the process of garnishment: *Claghorn v. Saussey*, 51 Ga. 576. And the wages of a clerk and secretary, whose duty it is to receive dictation and transcribe for his employer his letters and other documents, and generally to perform the duties of an amanuensis, stenographer and private secretary, including the keeping of books, whose salary is payable monthly, and who may be discharged at any time, are not subject

to garnishment: *Abrahams v. Anderson*, 80 Ga. 570; 12 Am. St. Rep. 274.

Within the Meaning of Lien Laws.—In Georgia, the court makes a wide distinction between the meaning of the word "laborer" as used in the statute relating to garnishment of wages and the same word as used in a statute giving a lien to the laborer upon the property of his employer for his wages. It is held, under the latter statute, that a clerk employed in a store or other establishment, unless he performs manual labor, is not a laborer, and is not entitled to such lien: *Ricks v. Redwine*, 78 Ga. 273. One who is employed merely to labor as a clerk in a store is not such a laborer as is contemplated by the statute giving a lien to a laborer on the property of his employer. Something must be averred and shown other than that the party seeking the lien was a clerk. The word "laborer," as used in such statute, means what was generally known as a laborer at the time of its passage, and clerks, agents, and like employées, whose employment is associated with mental labor and skill, were not deemed laborers, and not included in the statute as such: *Hinton v. Goode*, 78 Ga. 233. But a person employed as clerk, bartender, and boy of all work, to labor in and about a grocery store, is a laborer, within the meaning of such statute and entitled to the lien provided for therein: *Oliver v. Boehm*, 63 Ga. 172. In New York, it has been held that a person acting as bookkeeper and general manager of a corporation is not a laborer within the meaning of such a statute. To constitute a laborer the services rendered must be mental or manual, and he who performs them must be of a class who usually look to the reward of a day's labor for immediate or present support, and who do a day's work, or a stated job, under the direction of a superior: *Wakefield v. Fargo*, 90 N. Y. 213.

Overseers, Foremen, and Superintendents.—In an early case in Georgia, it was held that under a statute exempting the wages of laborers from garnishment, the wages of a farm overseer paid him daily or weekly were exempt: *Caraker v. Mathews*, 25 Ga. 571. On the other hand, it has been held in several cases that a farm overseer is not a laborer within the meaning of laborer's lien laws: *Flournoy v. Shelton*, 43 Ark. 168; *Whittaker v. Smith*, 81 N. C. 340; 31 Am. Rep. 503; *Isbell v. Dunlap*, 17 S. C. 581. But a person hired by mineowners to oversee miners, and generally to control and direct the working and development of the mine and who, in the exercise of his duties, performs some manual labor, is a laborer and has a lien for his wages within the meaning of laborer's lien laws: *Cullins v. Flagstaff etc. Min. Co.*, 2 Utah, 219; affirmed on appeal, 104 U. S. 176; *McLaren v. Byrnes*, 80 Mich. 275. And a foreman in a coal mine is entitled to have his wages as a laborer exempt from attachment: *Pennsylvania Coal Co. v. Costello*, 33 Pa. St. 241. But a "boss", or director, of an entire department of an extensive factory, employing and discharging the hands who work under him, and who receives a monthly salary payable at the end of every two weeks, and who is not required to do manual labor, but is expected, from his skill and intellectual fitness, to direct the work of the operatives under him, is not a day laborer whose wages are exempt from garnish-

ment: *Kyle v. Montgomery*, 73 Ga. 337. Nor is a superintendent and timekeeper for a railroad company a laborer, within the meaning of a statute giving laborers a lien for their wages: *Missouri etc. R. R. Co. v. Baker*, 14 Kan. 564; nor the secretary of a manufacturing company: *Coffin v. Reynolds*, 37 N. Y. 640; nor its president: *England v. Beatty Organ etc. Co.*, 41 N. J. Eq. 470. Nor the assistant general manager of a railroad company: *State v. Rusk*, 55 Wis. 465. In *Pendergast v. Yandes*, 124 Ind. 159, it was held that a superintendent of a gas company in the construction of its pipe lines, who had full supervision of the digging of gas trenches, and the laying of gaspipes, with full power to hire and discharge the employes of the company, and whose duties required him to do considerable walking along the pipe lines, as well as the handling of wrenches and other tools for short periods of time, but who was not required to do any other physical or manual labor, was a laborer within the meaning of a statute giving laborers a preferred claim for wages against their employers.

Engineers, etc.—A civil engineer employed by a railroad company (*Pennsylvania etc. R. R. Co. v. Leuffer*, 84 Pa. St. 168; 24 Am. Rep. 189), or a consulting engineer who renders services as such for a corporation, is not a laborer within the meaning of such a statute: *Ericson v. Brown*, 38 Barb. 390. A locomotive engineer in the employment of a railroad company is a day laborer whose wages are not subject to garnishment: *Sanner v. Shivers*, 76 Ga. 335. But a railroad passenger or freight train conductor who has full charge and management of trains and everything in and about them, is not such "day laborer," and his wages, payable monthly, are subject to garnishment: *Miller v. Dugas*, 77 Ga. 386; 4 Am. St. Rep. 90.

Money due an owner of a threshing machine for threshing grain in the ordinary manner is not wages due a laborer, so as to exempt it from execution as such wages: *Johnston v. Barrilla*, 27 Or. 251; 50 Am. St. Rep. 717; and one who performs services in sawing up lumber which involves capital, machinery, and the labor of employes, is not a laborer, and compensation paid him per thousand feet for sawing the lumber is not wages: *Campfield v. Lang*, 25 Fed. Rep. 128.

Mechanics.—A person, though a mechanic, who performs actual manual labor for his employer, is a laborer and entitled to a laborer's lien on the property of his employer, for his wages: *Adams v. Goodrich*, 55 Ga. 233. And the same rule applies to a distiller who works in the distillery of his employer: *Floyd v. Chess Carley Co.*, 70 Ga. 752.

A "teamster" who habitually earns his living by the use of his team is a laborer, within the meaning of labor liens and exemption laws: *Floyd v. Chess Carley Co.*, 76 Ga. 752; *Dove v. Nunan*, 62 Cal. 399. A teamster employed by a contractor in the construction of a railroad is a laborer, within the meaning of such statutes: *Mann v. Bent*, 35 Kan. 10.

Peddlers.—One who is the head of a family, and who earns his living by the sale of oils at retail from a tank wagon, sometimes driven by himself, and sometimes by his minor son, is a laborer who habitually earns his living by the use of his team and wagon,

within the meaning of an exemption statute, although he makes some sales of oil from his storeroom: *Consolidated Tank Line Co. v. Hunt*, 83 Iowa, 6; 32 Am. St. Rep. 285.

A *United States mail carrier*, who uses his own horse and vehicle in carrying the mail, is a "laboring person," within the meaning of a constitutional provision that the homestead exemption shall not extend to any execution, order, or other process issued on any demand for services rendered by a laboring person or mechanic: *Farinhold v. Luckhard*, 90 Va. 936; 44 Am. St. Rep. 953.

A person who claims an exemption from execution on the ground that he is a teamster and a laborer, must show that he himself habitually earns his living by the use of his team: *Brusie v. Griffith*, 84 Cal. 302; 91 Am. Dec. 695; *Dove v. Nunan*, 62 Cal. 399; and he cannot claim the exemption on that ground, if he has a position as clerk in a store at a stated salary, while his team is habitually used by his minor son for the benefit of the claimant and his family: *Brusie v. Griffith*, 84 Cal. 302; 91 Am. Dec. 695.

One employed as a commercial traveler to sell goods for his employer, and paid for his services by the day, is not a "day laborer" whose wages are exempt from garnishment: *Briscoe v. Montgomery*, 93 Ga. 602; 44 Am. St. Rep. 192. An agent who sells goods by sample is not a "laboring man, so as to exempt his wages from seizure: *Wildner v. Ferguson*, 42 Minn. 112; 18 Am. St. Rep. 495. A traveling salesman employed by a corporation is not a "laborer" within the meaning of labor lien laws: *Jones v. Avery*, 50 Mich. 326.

School Teachers.—It has been held that the wages of a school-teacher paid a monthly salary are not subject to garnishment, not only because he is, in effect, a "day laborer" within the meaning of the statute, but also on the ground of public policy: *Hightower v. Slaton*, 54 Ga. 108; 21 Am. Rep. 273. And this seems a reasonable rule, although it is maintained in Pennsylvania that such teacher is not a laborer within the exemption act, and that money due him for teaching is not exempt from attachment: *Schwacke v. Langton*, 12 Phila. 402; and the latter rule prevails in Connecticut: *Seymour v. Over River School Dist.*, 53 Conn. 502.

Contractors are not laborers within the meaning of statutes giving to "laborers" a right to a lien upon the property of their employers for their wages: *Tod v. Kentucky etc. Ry. Co.*, 52 Fed. Rep. 241; *Lehigh Coal etc. Co. v. Central R. R. Co.*, 29 N. J. Eq. 252; *Aikin v. Wasson*, 24 N. Y. 482; *Kjeldsen v. Wilson*, 77 Mich. 45; *Vane v. Newcombe*, 132 U. S. 220; *Richardson v. Norfolk etc. Ry. Co.*, 37 W. Va. 641. A contractor for the manufacture of brick at a fixed price per thousand furnishing and paying all help and keeping the machinery in order, is not a "laborer" within the meaning of a statute providing that no property of a debtor shall be exempt from levy and sale on execution or attachment for "clerks', laborers', or mechanics' wages": *Henderson v. Nott*, 36 Neb. 154; 38 Am. St. Rep. 720.

Architects.—Although some cases maintain that an architect who simply provides the plans and specifications for a building and superintends its construction is not entitled, under mechanics' lien laws, to a lien against the building as a "laborer" (*Price v. Kirk*, 90 Pa. St.

47; Rush v. Able, 90 Pa. St. 153; Raeder v. Beusberg, 6 Mo. App. 415), yet the better considered, as well as the majority of cases hold that an architect is a "laborer" and entitled to enforce a lien: Mutual Benefit Co. v. Rowland, 26 N. J. Eq. 389; Knight v. Norris, 13 Minn. 475; Mulligan v. Mulligan, 18 La. Ann. 21; Stryker v. Cassidy, 76 N. Y. 50; 82 Am. Rep. 262, and extended note, 264-267.

DERRICK v. SAMS.

[26 GEORGIA, 207.]

MORTGAGES—DESCRIPTION—PAROL EVIDENCE TO AID.—If land is described in a mortgage by specified number of lots situated in a certain state, county, and district, and as being "the land purchased by J. L. Henson of J. E. Derrick," the description, as a whole, is not so totally defective and uncertain as to render the mortgage inadmissible in evidence on a suit to foreclose it. Such description may be aided, and the land covered by the mortgage identified, by parol evidence.

MORTGAGES—FORECLOSURE—INSUFFICIENT DEFENSE.—The fact that land covered by a mortgage has been set apart to the widow of the mortgagor for her support, against objections filed by the mortgagee, does not bar his right to foreclose the mortgage.

MORTGAGES—FORECLOSURE—DEFENSE.—A plea in opposition to a proceeding to foreclose a mortgage alleging that at the time of the execution of the mortgage the mortgagor "was very old and sick, and unable to write his name, but made his mark, and that he was heavily under the influence of opiates, and, at the time, in a comatose condition, and was wholly unable to make any sort of contract that the mortgagor was unable to read the contract, that it was never read over to nor understood by him, and that if it had been read to him he could not have understood it," states a good defense to the proceeding and should not be stricken out.

W. S. Paris and R. E. A. Hamby, for the plaintiff.

W. T. Crane, for the defendant.

308 **SIMMONS, C. J.** 1. Derrick sought to foreclose certain mortgages purporting to have been given by Sams, and the administrator of Sams filed a plea in resistance to the proceeding. On the trial of the case, the court, upon objection by counsel for the defendant, excluded the mortgages, on the ground that the description therein of the land mortgaged was insufficient, and refused to receive parol evidence offered to further identify the land. The description of the land was: "Parts of lots of land Nos. 22 and 38 in the 5th land district of Rabun county, Ga., it being the land purchased by J. L. Henson of J. E. Derrick." We do not think this description, as a whole, was so totally defective and uncertain as to render the mortgages inadmissible in

evidence. It is not essential that the description should completely identify the land. A description should not, as a matter of law, be treated as insufficient if it furnishes the means of identification. The description above quoted does this. It gives the state, county, and district in which the land is situated, and the number of the lots, and says ³⁹⁹ that it is "the land purchased by J. L. Henson of J. E. Derrick." By the aid of the parol testimony offered by the plaintiff, the land could easily have been identified and its boundaries ascertained, so that the judgment of foreclosure might fully describe it. The description being ambiguous without the aid of such testimony, the testimony offered was clearly admissible to explain the ambiguity: See *Shore v. Miller*, 80 Ga. 93, 12 Am. St. Rep. 239, where the description was similar to the one in question here. See, also, *Jennings v. National Bank*, 74 Ga. 787, 788, and cases cited; *Parler v. Johnson*, 81 Ga. 255; *Wiggins v. Gillette*, 93 Ga. 23; 44 Am. St. Rep. 123; *Broach v. O'Neal*, 94 Ga. 475.

2. One of the defenses set up by the administrator was that the land in question had been set apart by the court of ordinary as a twelvemonth's support for the widow and children of the intestate, over objections filed by the mortgagee, and that the mortgagee was thereby concluded and his right to foreclose the mortgage barred. This plea was demurred to, and the demurrer overruled. We think the demurrer should have been sustained. The fact that the plaintiff appeared in the court of ordinary and objected to the setting apart of the land as a year's support does not estop him from obtaining a judgment against the estate of the mortgagor or against the land. He had a lien on the land, and was entitled to a judgment setting up that lien. If he should undertake to enforce the judgment by levying upon the land, he might then be met by the judgment of the ordinary setting apart the land as a year's support.

3. Another of the pleas filed by the administrator alleged that the intestate, at the time of executing the mortgages, "was very old and sick and unable to sign his name . . . but made his mark, that he was heavily under the influence of opiates and at the time was in a comatose state . . . and was wholly unable to make any sort of contract," also that the mortgagor was unable to read the contract, that it was never read over to nor understood by him, and that if ⁴⁰⁰ the same had been read to him he could not have understood it. We think it was clearly not error to refuse to strike this plea. If the allegations contain-

ed therein are true, no court would hold that the mortgages were valid contracts.

Judgment reversed.

EVIDENCE—PAROL—TO AID DESCRIPTION IN MORTGAGE. A mortgage was executed upon land, excepting "twenty acres from the northeast corner of said above described tract of land formerly deeded to William Davis and Emeline M. Davis." In an action to recover the said twenty acres, it was held that parol evidence was admissible to show that the twenty acres intended to be excepted was not in the northeast corner but off the south end: *Lanman v. Crooker*, 97 Ind. 163; 49 Am. Rep. 437. See, also, *Frey v. Drahos*, 6 Neb. 1; 29 Am. Rep. 353; *Snyder v. Partridge*, 138 Ill. 173; 32 Am. St. Rep. 130.

MORTGAGES—FORECLOSURE—DEFENSES.—In an action by a mortgagee to enforce a mortgage, the mortgagor may successfully dispute its validity by showing that it was given without any consideration, and for the purpose of defrauding his creditors: *Williams v. Clink*, 80 Mich. 297; 30 Am. St. Rep. 443; and see *Norris v. Heald*, 12 Mont. 282; 33 Am. St. Rep. 581.

KING v. NEEL.

[98 GEORGIA, 433.]

COTENANCY—CONVERSION.—An action of trover does not, as a general rule, lie in favor of one cotenant against another, for the reason that the possession of one is the possession of the other, but such action may be maintained by one cotenant against the vendee of a cotenant who has sold and delivered the entire common property without the consent of his cotenant.

Trover. On June 17, 1879, F. P. Gray, administrator of Lewis Tumlin, brought trover against J. B. King to recover a two months' interest in a wool carder and appurtenances sold to him by Thomas Tumlin, but belonging to N. S. Eaves, Thomas Tumlin, and Lewis Tumlin's estate as tenants in common, and sold without the knowledge or consent of the other two joint owners some time during the years 1878 or 1879. Plaintiff's demand upon King for the return of the property was refused, and, on the trial, defendant pleaded not guilty. Plaintiff recovered judgment, and a motion for a new trial on behalf of defendant being refused, he excepted.

J. W. Harris, Jr., for the plaintiff in error.

Neel & Swain, for the defendant in error.

⁴⁴¹ **LUMPKIN, J.** Stripped of all complication, this case turned upon the question indicated in the first headnote, and

that question has been clearly settled by at least two decisions rendered by this court not long after its organization, and which seem to be well supported: See *Hall v. Page*, 4 Ga. 428; 48 Am. Dec. 235, and authorities cited; *Starnes v. Quin*, 6 Ga. 84. The decision of this court in both cases was pronounced by Judge Nisbet. In the former, page 435, he says: "As a general rule, it is not denied anywhere, but that trover will not lie in favor of one tenant in common against his cotenant. The reason is, that the one tenant is as much entitled to the possession as the other. The possession of one is, in law, the possession of both. . . . An exception to this rule is, where there is a destruction or loss of the common property by one of the tenants. . . . Another exception is found in the case of a sale of the property by one tenant. Tenants in common having equal right of possession, and an undivided property, one has no right to dispose of the property and transfer the possession, to the injury of the other. In this regard, they are unlike partners." In the latter case, Judge Nisbet says (page 87): ⁴⁴² "It is true, generally, that an action of trover does not lie in favor of one tenant in common against his cotenant, because the possession of one is the possession of all; yet it will lie in case of the destruction or sale of the property."

The ground of the motion for a new trial relating to newly discovered evidence was fully met by the counter-showing. Besides, there was an evident want of diligence to obtain this evidence before the trial.

The judgment below was manifestly right.

Judgment affirmed.

COTENANCY—CONVERSION.—If one cotenant appropriates to his own use the whole of the proceeds of a sale of the common property without the consent of the other, the latter is entitled to treat the appropriation as a conversion, and to maintain an action therefor: *Knope v. Nunn*, 151 N. Y. 506; 50 Am. St. Rep. 642, and note. A cotenant out of possession of personal property has no remedy at law against his cotenants in possession, unless the latter's dealing with the property amounts to a conversion: *Robinson v. Dickey*, 148 Ind. 205; 52 Am. St. Rep. 417, and note.

BERRY v. SHANNON.

(26 GROUND)

SALES—BREACH OF WARRANTY—ABATEMENT IN PRICE.—In an action to recover the agreed price of an animal warranted to be serviceable for a particular purpose, and found to be of no value for that purpose, the purchaser is entitled to an abatement of the purchase price equal to the difference between the agreed price and the actual value as reduced by the defective quality of the animal; and this is true whether in disposing of the animal to a third person the first purchaser loses anything or not, for what he realizes is of no consequence except as it may tend to illustrate the question of value.

SALES—BREACH OF WARRANTY.—THE MEASURE OF DAMAGES in an action for breach of warranty on the sale of a chattel is the difference between the actual value of the article sold and its value if it had been as warranted, and this is not affected by proof that the purchaser subsequently resold it, at an increased price, especially if it does not appear that such sale by him was without warranty.

Wright & Hamilton and C. Rowell, for the plaintiff in error.

C. A. Thornwell, for the defendant in error.

⁴⁵⁰ **LUMPKIN, J.** Shannon brought an action against Berry upon two promissory notes for three hundred and thirty-seven dollars and three hundred and thirty-eight dollars, respectively. The defense was, that these notes were given for the price of a jackass, which the seller expressly warranted to be suitable for the principal purpose for which an animal of this character can be made serviceable. It appeared from the defendant's evidence that the animal was not suitable for this purpose, and therefore was worth considerably less than he would have been had he come up to the warranty, but that nevertheless he had sold the animal to a third person for the sum of six hundred and fifty dollars. At this stage of the proceedings, and without allowing the defendant to submit other evidence material to his defense, the court took the case in hand and directed a verdict in favor of the plaintiff for six hundred and fifty dollars, holding that in any event the plaintiff was entitled to recover as ⁴⁶⁰ much as the defendant had realized upon a sale of the animal.

We have no doubt at all that this was error. The purchaser was entitled to have just such an animal as he contracted for, and the seller was bound to make good his warranty; and, upon the failure of the latter to do so, he must suffer an abatement of the price, because of the breach of his covenant. The question is really free from difficulty, and has practically been settled by the decision of this court in *Atkins v. Cobb*, 56 Ga. 86. The

seventh headnote in that case reads as follows: "The abatement of the purchase money for goods sold with warranty of quality, express or implied, should be equal, at least, to the difference between the agreed price and actual value as reduced by defective quality. Purchasers are entitled to this abatement whether, in disposing of the goods, they lost anything or not. What they realized is of no consequence, except as it may tend to illustrate the question of value": And see the comments of Judge Bleckley on pages 90, 91. This decision is well supported by the authorities, a few of which we will notice. In 2 Sedgwick on Damages, 474, 475, we find the following: "It results from the general rule that it is erroneous, in an action on a note given for the price of a chattel, for the court to charge the jury that, although they should find the covenant to have been broken, if at the time of the sale the chattel in its unsound state was worth the price for which it was sold, the defendant had sustained no damage. Nor is the rule affected by proof that the purchaser afterward sold the property for as much as or more than he paid for it. Where the property at the time of the sale had no market value, and it is impossible to get at its real value at that time if it had been as warranted, the price paid may be taken to represent that value. And it is sometimes said generally that the price at which the property was sold is evidence of its value at that time as if warranted. Where, in an action for damages for a breach of warranty, the consideration ⁴⁶¹ given for the warranted article consisted in another article which was exchanged for it, evidence of the value of the exchanged property will be allowed, as tending to show what the value of the other would have been if it had corresponded with the warranty. The price realized on a second sale is admissible as one mode of determining the value." The author cites in support of his text our case in *Atkins v. Cobb*, 56 Ga. 86, and also *Hunt v. Van Deusen*, 42 Hun, 392, and *Brown v. Bigelow*, 10 Allen, 242, both precisely in point. In the case last cited it was held that: "The rule of law that the measure of damages in an action for breach of warranty on the sale of a chattel is the difference between the actual value of the article sold and its value if it had been as warranted is not affected by proof that the purchaser subsequently resold it for an increased price, especially if it does not appear that such sale by him was without warranty": And see 2 Benjamin on Sales, Corbin's ed., 1160, 1161; *Thornton v. Thompson*, 4 Gratt. 121; *Brock v. Clark*, 60 Vt. 551.

The decision of this court in *Henry v. Central R. R. etc. Co.*, 89 Ga. 815, does not conflict with the law as here laid down. That was an action of tort in which the plaintiff's right to damages was predicated upon the negligence of the carrier. It had made no express covenant or warranty of any kind to deliver the plaintiff's meat in any given condition, but was simply under a statutory duty of taking the proper care of the meat and delivering it to the plaintiff within a reasonable time. It was accordingly held that if the plaintiff, notwithstanding the damaged condition of a portion of the meat, by a sale of the same protected himself from actual loss, he could not recover from the railroad company because of its damaged condition. That case, therefore, stands upon an obviously different footing from that of the case at bar.

Judgment reversed.

SALES—BREACH OF WARRANTY—MEASURE OF DAMAGES—REMEDIES OF BUYER.—In executory sales, as of large quantity of brick to be delivered from time to time, an implied warranty of quality exists, and the purchaser is not bound to return the goods and rescind the contract, upon discovering a breach, but may set up his damages by reason thereof in a cross-action. The measure of damages is the difference in value between the articles sold and those delivered, at the time and place of delivery: *Bushman v. Taylor*, 2 Ind. App. 12; 50 Am. St. Rep. 228, and note. As to the buyer's remedy generally, see *Morse v. Moore*, 83 Me. 473; 23 Am. St. Rep. 733, and note; also, note to *Getty v. Rountree*, 54 Am. Dec. 143.

SCHOFIELD v. WOOLLEY.

[96 GEORGIA, 543.]

ATTORNEY AND CLIENT—MONEY COLLECTED AS TRUSTS—LIMITATIONS.—If money collected by an attorney for a client is retained by the former, the fund does not constitute a continuing trust in the absence of fraud, nor prevent the running of the statute of limitations in favor of the attorney. On the contrary, the statute begins to run from the time that the receipt of the money by the attorney is known to the client, without regard to demand made by the latter.

ATTORNEY AND CLIENT—COLLECTIONS—STATUTE OF LIMITATIONS.—If an attorney collects money for his client in settlement of litigation instituted by him, and the client refuses to ratify the settlement or to receive the money, and institutes proceedings to set aside the settlement, and the attorney retains the money collected during the pendency of such proceedings, the repudiation of his act in collecting the money does not stop the running of the statute of limitations against an action to recover the money from him, especially when the proceedings to set aside the settlement are not instituted on reasonable or plausible grounds, and result in sustaining the act of the attorney.

ATTORNEY AND OLIENT—COLLECTIONS—STATUTE OF LIMITATIONS.—The fact that an attorney after collecting money for his client retains it, and informs his client in writing that he has collected it and will pay it over as soon as he has paid certain contingent fees chargeable against it, does not stop the running of the statute of limitations against an action to recover the money from him, although such contingent fees were never paid.

Dessau & Hodges and C. L. Bartlett, for the plaintiffs.

Erwin, Cobb & Woolley and King & Anderson, for the defendants.

549 **SIMMONS, C. J.** On April 18, 1893, a suit of which the present suit is a renewal, was brought against the administrator of Rutherford to recover a certain sum alleged to have been received by the intestate on March 7, 1883, from one Franklin, in settlement of a suit of the plaintiffs in which Franklin was defendant and in which the intestate represented the plaintiffs as an attorney at law. The declaration was demurred to on several grounds, the main ground being that it was barred by the statute of limitations. The demurrer was sustained, and the plaintiffs excepted.

It appears from the declaration that the plaintiffs refused to ratify the settlement in pursuance of which the money sued for had been paid to Rutherford, and that a suit to set aside the settlement was instituted by them on February 11, 1889, which suit resulted, on March 1, 1891, in a verdict in favor of the defendants therein. On the day on which this verdict was rendered, Rutherford died. It further appears that on March 9, 1883, two days after the money was collected by Rutherford, "he promised in writing that he would pay over to the petitioners said money after he had paid certain contingent fees due and owing to certain local counsel whom he had employed to assist him 550 on the trial of said cause, the amount of whose fees had not been determined." It is alleged that this money was held in trust by Rutherford to pay himself a contingent fee, to pay contingent fees of assistant counsel, and to pay the balance to the plaintiffs; that this had not been done, and was a subsisting trust. There is no allegation of fraud. It was contended that, under the facts alleged, there was a continuing trust until the death of the intestate, and that the statute of limitations did not begin to run until after demand had been made upon the administrator.

It is true, a subsisting, recognized, and acknowledged trust is not within the operation of the statute of limitations; but this rule applies only to those technical trusts which are cognizable alone in a court of equity: Code, sec. 3196; 2 Wood's Limita-

tion of Actions, sec. 200; *Douglas v. Corry*, 15 Am. St. Rep. 604, and cases cited; and the relation of an attorney to his client, where the attorney retains in his hands money collected for the client, does not constitute such a trust. In the case of *Southern Star etc. Co. v. Cleghorn*, 59 Ga. 782, it was said by Bleckley, J: "An attorney's possession of the money of his client is more like that of a mere agent or bailee. It would be deviating from the ordinary use of language to call the client's money trust property; and the sole duty of the attorney in respect to it is to pay it over. He has no right to control and manage it as a trustee in possession. In this regard his powers do not extend beyond those of an attorney in fact appointed to collect; the latter is not a technical trustee: *Bowen v. Johnson*, 12 Ga. 9. Prior to the code the rank of a claim against a deceased attorney at law for money collected in his lifetime was on a par with bonds or other obligations: *Smith v. Ellington*, 14 Ga. 379. We think it has not been advanced. If it was, all deposits and bailments (where conversion has followed) have undergone a similar advancement, for in a general sense they are all trusts." In *Wood on Limitations of Actions*, second edition, section 18, page 54, it is said: "The liability of an ⁵⁵¹ attorney for money of his client which has come into his hands, in the absence of fraud, is simply that of an agent or factor, and creates a simple contract debt only. The rule is, that where an attorney collects money for his client, the statute begins to run from the time of its receipt, and that, too, without regard to notice or demand by the client." Upon the question whether notice or demand is required the authorities differ, but it is said that, "in the absence of proof, the law will presume notice and demand made in a reasonable time after the money is collected, and at that time the action will be deemed to have accrued": *Weeks on Attorneys*, sec. 263.

In the present case, it appears that the plaintiffs had notice of the collection within two days after the money was received by the defendant's intestate; but instead of authorizing the payment of fees of counsel from this fund, as proposed or promised by the defendant's intestate, the plaintiffs refused to ratify the settlement, and brought suit to have it set aside. It cannot be said, therefore, that there was any trust to apply the money for the purpose stated. And it is clear that a repudiation of his act in collecting the money will not stop the running of the statute, especially when the result of the proceeding to set aside the settlement was to sustain what had been done by the attorney, and

when, so far as appears, there were not even plausible grounds for such a proceeding.

The statute of limitations is a statute of repose, and it would seem that if there is any case to which the statute should apply, it is a case like this, where parties for whom an attorney has collected money wait for six years, with full knowledge of all the facts, before taking any steps to have the action of the attorney declared not binding upon them, and for ten years and until the attorney's lips are sealed in death, before bringing an action to recover the money collected.

All actions upon contracts not in writing, whether express ⁵⁵³ or implied, being barred after four years from the time the cause of action arose, when not otherwise provided, and all actions upon simple contracts in writing being barred after six years (Code, secs. 2917, 2918, 2923, and the contract of an attorney to pay over money collected for a client being no exception to the statute, it follows from what has been said that the present action was barred.

Judgment affirmed.

LIMITATIONS OF ACTIONS—ATTORNEY AND CLIENT—CAUSES OF ACTION BETWEEN.—The statute of limitations begins to run from the time of the collection of money by an attorney for his client, which should have been paid over, where there has been no fraudulent concealment of the receipt of the money: *Douglas v. Corry*, 46 Ohio St. 349; 15 Am. St. Rep. 604. See, also, *Wilder v. Secor*, 72 Iowa, 161; 2 Am. St. Rep. 236, and note.

ATTORNEY AND CLIENT—COLLECTIONS BY ATTORNEY FOR CLIENT—TRUSTS.—The duty of an attorney to pay over money collected for his client does not give rise to a continuing and subsisting trust within the meaning of a statute excepting such trusts from the operation of the statute of limitations: *Douglas v. Corry*, 46 Ohio St. 349; 15 Am. St. Rep. 604, and note.

LIMITATIONS OF ACTIONS—ACKNOWLEDGMENT—WHAT IS SUFFICIENT.—An acknowledgment sufficient to remove the bar of the statute of limitations must contain a clear and unequivocal acknowledgment of the debt, a specification of the amount of it, or a reference to something by which the amount can be definitely and certainly ascertained, and an express or implied promise to pay it: *Ward v. Jack*, 172 Pa. St. 416; 51 Am. St. Rep. 744, and note. See *Nelson v. Hanson*, 92 Iowa, 356; 54 Am. St. Rep. 568.

MILLER v. WILSON.

[98 GEORGIA, 567.]

TROVER—CONVERSION BY AGENT.—An agent who takes the property of another without his consent, and delivers it to his principal, is guilty of a conversion and is liable in trover for the recovery of the property, or in damages, although he may have acted in ignorance of the true owner's title, and in perfect good faith.

TROVER—CONVERSION—DEMAND.—If an actual conversion is shown, no demand is necessary before bringing an action of trover to recover the property.

Trover by Miller against Wilson to recover a mule. Judgment of nonsuit, and plaintiff excepted. Miller owned a plantation, and employed one Berry as his foreman or overseer. Defendant, at the request of the Richland Guano Company, went to see Berry to collect a debt which the latter owed said company. Berry proposed to settle the debt by delivering to the defendant two mules, one of which is the animal in suit. Berry delivered to defendant such mule for the company, and he delivered it to the company as part payment of the debt, as agreed upon between himself and Berry. Defendant was merely acting as agent for the company, and was authorized to make such a settlement. No demand had ever been made upon him for the mule, and he had never had possession of it except during the time necessary to deliver it from Berry to the company. He thought that Berry owned the mule and had a right to sell it, and had no notice of plaintiff's title until after he had delivered it to the company, nor had he, at any time, asserted any right of title or possession to the mule. The mule, in fact, during all of the time mentioned was the property of the plaintiff.

Miller, Wynn & Miller and E. T. Hickey, for the plaintiff.

J. B. Hudson, for the defendants.

See **SIMMONS, C. J.** This was an action of trover for a mule. The facts are set out by the reporter. Under these facts we think the court erred in granting a nonsuit. The defendant was not relieved from liability by the fact that in receiving the mule from Berry he acted as the agent of the guano company, and without notice of the plaintiff's title, and under the belief that Berry owned the mule and had a right to sell it. Whoever meddles with another's property, whether as principal or agent, does so at his peril, and it makes no difference that in doing so he acts in good faith, nor, in the case of an agent, that he delivers the

property to his principal before receiving notice of the claim of the owner. If an agent takes the property of another without his consent and delivers it to the principal, it is a conversion, and trover will lie for the recovery of the property or for damages as the plaintiff may elect. This is well settled: *Mechem on Agency*, secs. 571, 573, 574, and citations; *Cooley on Torts*, *452; *Ewell's Evans on Agency*, *75; *Stephen v. Elwall*, 4 Maule & S. 259; *Lee v. Mathews*, 10 Ala. 682; 44 Am. Dec. 498. And see *Rushin v. Tharpe*, 88 Ga. 782. Where an actual conversion is shown, no demand is necessary, evidence of demand and refusal being required only as evidence of a conversion: *Rushin v. Tharpe*, 88 Ga. 782.

Judgment reversed.

TROVER—WHAT AMOUNTS TO CONVERSION—PRINCIPAL AND AGENT.—A conversion is any unauthorized act which deprives a man of his property permanently or for an indefinite time. A wrongful assumption of the ownership of property may be a conversion of it, rendering a demand and refusal unnecessary: *Union Stock Yard etc. Co. v. Mallory*, 157 Ill. 554; 48 Am. St. Rep. 341. That the defendant acted as an agent or servant of another does not furnish any justification in an action of trover: *McPheters v. Page*, 83 Me. 234; 23 Am. St. Rep. 772. See, also, *Fort v. Wells*, 14 Ind. App. 531; 56 Am. St. Rep. 316, and note.

TROVER—DEMAND BEFORE SUIT—WHEN NECESSARY.—Conversion cannot be based on possession retained by agreement until demand and refusal to deliver after the assent has been withdrawn, or the time covered by it has lapsed: *Bolling v. Kirby*, 90 Ala. 215; 24 Am. St. Rep. 789, and extended note. See *Union Stockyard etc. Co. v. Mallory*, 157 Ill. 554; 48 Am. St. Rep. 341.

HOBBS v. CHICAGO PACKING AND PROVISION CO.

[99 GEORGIA, 576.]

TROVER AND CONVERSION—PARTNERSHIP.—If an owner of goods ships them upon a bill of lading whereby they are consigned to his own order, at the same time drawing in favor of a banking partnership "for collection" a draft upon the person to whom the goods are intended to be delivered upon payment of the draft, and also attaching to the draft the bill of lading, so indorsed as to give the partnership control of the possession of the goods, a delivery to them by this firm to the drawee of the draft without requiring its payment, is, as against the owner, a conversion subjecting the firm to an action of trover. This rule is not rendered inapplicable by the fact that the owner, not knowing that the goods had been delivered, agreed to make a like shipment of other goods on condition that the partnership would guarantee the payment of the former draft within a certain time. It appearing that this agreement was simply to expedite the delivery of the goods first shipped and the collection of their price.

TROVER AND CONVERSION—PARTNERSHIP.—If the wrongful delivery of the goods of a third person, while in the custody of a partnership, is an act done within the scope of a partnership business, it, though made by a single member of the firm without the knowledge or consent of the other members of the firm, renders all of the copartners or the firm liable in trover for a conversion of the goods.

TROVER AND CONVERSION.—A WRONGFUL delivery of goods, either negligently or willfully made, by one who has been entrusted with their custody, constitutes a conversion by the latter.

PARTNERSHIP—LIABILITY FOR TORTS OF ONE PARTNER.—Each partner being an agent of the firm, the firm is liable for his torts committed within the scope of his agency, although ignorant of his acts.

The Chicago Packing and Provision Company brought trover against the firm of Hobbs & Tucker for certain meat shipped by plaintiff upon orders of N. L. Ragan from Chicago, Illinois, to Albany, Georgia, on April 11, May 10, and June 3, 1893. To the bills of lading were attached drafts of plaintiff on Ragan, payable to the order of Hobbs & Tucker, for the price of the meat. The bills of lading were issued to plaintiff, contained a direction to notify Ragan, and were indorsed: "Deliver to Hobbs & Tucker, or order, for collection." The drafts, with bills of lading attached, were forwarded by plaintiff, on making the shipments, to Hobbs & Tucker for collection. The meat was delivered to Ragan by the terminal carrier upon written request, signed by A. W. Tucker, active manager of the firm of Hobbs & Tucker, in which he stated that he would be responsible for the bills of lading. Ragan did not pay for the meat before he got it. The first of the three shipments was subsequently paid for, and the carrier received the bill of lading for it from Ragan. The other two bills of lading and drafts remained in the possession of defendants. Tucker had no dealings individually with plaintiff, but its dealings were with the firm of Hobbs & Tucker. The following correspondence by mail and telegraph was in evidence. February 27, 1893, plaintiff wrote to defendants: "We wrote to Mr. Ragan the day before yesterday, explaining fully the reason why we could not ship the last car of ribs ordered. The manner in which Mr. Ragan does business seems to us rather strange. The meat is shipped to our order, and, of course, cannot be delivered to him until he has taken up the bill of lading. It would seem, therefore, that some of this meat lies a long time on the track, or in some manner in possession of the railroad company. The meat might as well be in our house here as on the track or warehouse in Albany. There are other risks about this manner of doing business which we have explained to Mr. Ragan, and

which we do not feel justified in taking. Mr. Ragan seems to be a man of great energy, and it is very unfortunate that he lacks sufficient capital. We should like very well to do business with him, provided he would take up the draft on arrival of the car of meat. If your firm would guarantee the payment of all drafts in this manner, we would not hesitate to ship as many cars of meat as he might order." June 1, 1893, Ragan to plaintiff: "I have not been able to discount any paper lately, cause my delay both times; here few days; assist me this time; ship to-morrow," etc. Same date, defendants to plaintiff: "If you will ship Ragan car meat to-morrow, we will guarantee payment oldest draft on twelve June." June 2, 1893, plaintiff to defendants: "If guarantee payment of oldest draft on twelfth, and other on twentieth, will ship another car; otherwise will send instructions in reference to taking possession of both cars for our account." Same date, defendants to plaintiff: "All right; we accept your terms, if ship car ordered to-day." June 3, 1893, plaintiff to defendants: "We wrote you last night, confirming the telegrams which passed between us, in which you guarantee the payment of Mr. Ragan's drafts. We were rather reluctant to extend the time of payment of these drafts, because we fear that, in case of failure, the delay might be hurtful to the meat, and when we come to turn it over to someone else, a complaint might be made to us about its condition." Tucker testified "that he always understood the giving of his orders to the carrier to deliver the meat to Ragan, and thought the carrier's agent understood it, to be a personal transaction between them and Ragan, and that he gave the orders because the agent declined to accommodate Ragan without some guarantee." The agent testified that he understood that the orders given by Tucker were binding on the bank, though nothing was said about it, and if he had thought they bound only Tucker he would not have let Ragan have the meat. He never had any talk with Hobbs about it, or any business transacted with the bank in 1892, and, soon after Ragan commenced business with the plaintiff, he gave it a bond, with his brother as security, for fifteen hundred dollars, conditioned generally to protect plaintiff from losses. Afterward, a lot of meat having been shipped out, and plaintiff becoming dissatisfied, the bond was increased to five thousand dollars. Ragan generally sold meat in small quantities out of the cars, which would sometimes stay on the track quite awhile. Hobbs & Tucker failed in business on or about June 10, 1893, and the last two bills of lading were turned over to plaintiff's counsel. The

meat remaining on hand was taken in charge and sold to persons in Albany by the assistant secretary of plaintiff, who had come to Albany, and who, while there, stated to a witness that his house had taken a bond from Ragan to indemnify them against loss on account of Ragan not paying for the meat, that it was their understanding with Ragan that he could pay for the meat in ten or fifteen days, so that he could have time to turn round, and that they took the bond to indemnify against loss while he was making the turn." Hobbs & Tucker defended on the grounds that they had committed no tort for which this action would lie, and, if liable, it was only upon a contract of guaranty. That Hobbs, although a member of the firm for the purpose of doing a banking business only, really had no interest in the firm, nor any connection with or knowledge of the transaction involved in this case. Judgment for plaintiff, and defendants excepted.

W. T. Jones, Wooten & Wooten, and J. W. Walters, for the plaintiffs in error.

D. H. Pope, for the defendant in error.

⁵⁰⁰ LUMPKIN, J. The material facts are stated by the reporter. The questions of law involved in this case are indicated by the syllabus.

1. A wrong delivery of goods, either negligently or willfully made, by one who had been intrusted with the custody of them, is in law a conversion by the latter. This rule has been applied to carriers of goods: Savannah etc. Ry. Co. v. Sloot, 93 Ga. 803. In principle, it is alike applicable to the defendants in the present case. There was ample evidence to warrant the jury in finding that the meat of the Chicago Packing & Provision Company was, by its indorsement of the bills of lading, in effect delivered to Hobbs & Tucker, to be by them delivered to Ragan upon his payment for the same, and not otherwise. According to the verdict, the defendants violated the trust reposed in them; and, this being so, they ought to make good the loss sustained by the plaintiff on account of their unauthorized and unlawful conduct.

2. There was some evidence tending to show that the plaintiff had accepted a guaranty from Hobbs & Tucker that some of the meat which had already been delivered would be paid for, and that therefore the plaintiff's action should have been brought upon the defendants' breach of contract, and not in tort. We

think, however, that taking the evidence as a whole, it establishes the fact that when this guaranty was accepted, the plaintiff was in utter ignorance of the fact that the meat to the price of which the guaranty related had been actually delivered to Ragan. The plaintiff was evidently under the impression, at the time this guaranty was accepted, that the meat still remained ⁵⁸¹ in the cars or in the railroad depot under the control of Hobbs & Tucker; and it is apparent that, in agreeing to ship more meat upon Hobbs & Tucker guaranteeing payment of that already shipped, the plaintiff simply intended to expedite the delivery of the latter and the collection of the money due them for the same, they supposing that Hobbs & Tucker would see to it that Ragan came up with the cash within the time limited in the guaranty, but never contemplating that he should get the meat without paying for it.

3. It seems that the meat was delivered to Ragan upon orders signed by Tucker alone, and it was therefore urged that Hobbs was not liable. Under the facts, the act of Tucker in giving these orders was really an act of the partnership. It was the same, in effect, as if he had gone to the station agent and personally directed him to let Ragan have the meat, and it is evident that the agent thus treated and regarded the orders sent by Tucker. It can hardly be doubted that the act of Tucker in causing the delivery to be made to Ragan was within the scope of the partnership business; and, consequently, whether it was done with the knowledge and consent of Hobbs or not, he was in law liable. "Each partner being the agent of the firm, the firm is liable for his torts committed within the scope of his agency, on the principle of respondeat superior, in the same way that a master is responsible for his servant's torts, and for the same reason [that] the firm is liable for the torts of its agents or servants": 1 Bates on Partnership, sec. 461. "Where one partner, in a matter connected with the business of the partnership, does an act to the injury of a third person, which is a tort by construction or inference of law merely, his copartner is equally liable with him for the consequences of the act": Myers v. Gilbert, 18 Ala. 467. See, also, Witcher v. Brewer, 49 Ala. 119. "Partners may be sued in an action of trover, although there was no joint conversion ⁵⁸² in fact. A joint conversion may be implied in law by consent of a partner to the acts of his copartners": Bane v. Detrick, 52 Ill. 20. "Where a partner, in the course of partnership business, commits a fraud, or does acts prohibited by law, the firm is liable, although the other partners

have no knowledge of such fraud or illegal act": *Tenney v. Foote*, 95 Ill. 100. "The appropriation or misapplication by one partner of moneys or other property in the custody of the firm, within the scope of its business, or in the custody of such partner as a representative of the firm, renders each partner liable to the true owner for such conversion; and when thus in the custody of one partner, it is immaterial whether the other partners knew anything about it or not": 17 Am. & Eng. Ency. of Law, 1070. See, also, *Alexander v. State*, 56 Ga. 478.

4. We find no reason for setting aside the verdict in this case. It was full, warranted by the evidence, and no material error of law was committed on the trial.

Judgment affirmed.

TROVER AND CONVERSION—WHO ARE LIABLE.—One having notice of the claim of the true owner, and who delivers the property to another person, or permits him to take it out of his possession, whereby it is lost to the owner, is liable for its value in trover: *Bolling v. Kirby*, 90 Ala. 215; 24 Am. St. Rep. 789, and extended note.

PARTNERSHIP—LIABILITY FOR ACTS OF PARTNER—CONVERSION—TORTS.—Conversion committed by one partner, of property which has been delivered to him for purposes connected with the business of the partnership is deemed to be the act of the firm, unless repudiated by the other partners: *Nisbet v. Patton*, 4 Rawle, 120; 26 Am. Dec. 122. The refusal of one partner to deliver goods upon demand, which have been received by the firm, is evidence of a conversion by all the partners: *Holbrook v. Wight*, 24 Wend. 169; 35 Am. Dec. 607, and note. See, also, *Hess v. Lowry*, 122 Ind. 225, 17 Am. St. Rep. 355, as to the liability of a partnership for the torts of one partner. And see *Englar v. Offutt*, 70 Md. 78; 14 Am. St. Rep. 332.

BAGLEY v. COLUMBUS SOUTHERN RAILWAY Co.

[86 GEORGIA, 626.]

JUSTICE'S COURTS HAVE NO JURISDICTION of actions for damages to real estate.

FIXTURES—FENCES AND GROWING CROPS.—Fences permanently affixed to land, and unmaturing crops growing upon land belonging to the owner of such crops, constitute a part of the realty.

JUSTICE'S COURTS—JURISDICTION—DAMAGES TO FENCES AND CROPS.—A justice's court has no jurisdiction of an action for damages caused by the negligence of a railway company in setting fire to and burning fences inclosing an owner's lands and destroying its pasture and unmaturing crops.

L. McLester, for the plaintiff.

Battle & Miller, for the defendant.

626 **SIMMONS, C. J.** 1. Under the constitution of 1877, the jurisdiction of a justice's court over actions arising ex de-

lieto is confined to "cases of injuries or damages to personal property": Code, sec. 5153; *James v. Smith*, 62 Ga. 345, 347; *Mayor etc. of Cartersville v. Lyon*, 69 Ga. 577, 580; *White Star Line Steamboat Co. v. County of Gordon*, 81 Ga. 47. It follows that a justice's court has no jurisdiction of a case in which the plaintiff seeks to recover damages for an injury to realty caused by the wrongful act of the defendant.

2. In the present case, which was commenced in a justice's court, the plaintiff alleged that the defendant railway ⁶²⁷ company "did carelessly set fire to and destroy and burn a certain cow pasture and about three hundred yards of fencing and about one-half acre of cotton growing in the field, the property of complainant, and all of the value of twenty-five dollars." Whether the magistrate had jurisdiction to entertain the suit must depend, therefore, upon whether the property alleged to have been thus destroyed is legally to be considered and characterized as personalty or as realty. The burning of the plaintiff's "cow pasture" can scarcely be regarded as anything less than an injury to realty; indeed, to characterize such an injury merely as damage to personalty would appear to be an euphemism unwarranted under the strict rules of law. If the plaintiff really intended to aver that the grass or other natural herbage growing upon his pasture land was destroyed by fire, still such damage is to be legally considered as an injury to realty. "Growing crops, if fructus naturales, are part of the soil before severance": 4 Am. & Eng. Ency. of Law, 894. "It is generally held that growing trees, fruit, and grass are parcel of the land": Tyler on Fixtures, 735. As we shall hereinafter more fully discuss the nature of growing crops and their legal status, we may dismiss, for the present, further consideration of the plaintiff's claim of injury to his pasture, and pass to a discussion of the character of the damage he sustained by reason of the burning of his fences.

"A fence is generally considered to be a part of the realty": 7 Am. & Eng. Ency. of Law, 905, 906, citing cases. And to the same effect, see Tyler on Fixtures, 116, 132, 133. Certainly, where the owner of lands builds or maintains thereon a substantial fence, as a permanent structure constituting an improvement of the premises, such fence becomes as much an integral part of the realty as would a house or brick wall erected thereon. Our code settles this question, for it is declared in section 2219 that: "Anything intended to remain permanently in its place, though not actually attached to the land, such as a rail ⁶²⁸

fence, is a part of the realty." So the burning of the plaintiff's fences is likewise to be regarded as damage to realty.

Our main difficulty in disposing of the question of jurisdiction raised in this case has been to properly determine the legal character of the third item of damage claimed by the plaintiff, arising out of the destruction of unmaturing cotton growing in his field. Many of the modern text-books, and numerous adjudicated cases, have been adverted to during the course of our investigation; but with a result tending rather to confusion than to practical aid, so far as concerns a correct determination of the question whether, at common law, growing crops were characterized as personal or as real property. For instance, Mr. Freeman says: "Crops, whether growing or standing in the field ready to be harvested, are, when produced by annual cultivation, no part of the realty": 1 Freeman on Executions, sec. 113. And, in support of his text, he cites cases to show that unmaturing crops are "liable to voluntary transfer as chattels," "may be seized and sold under execution," and pass "to the executor or administrator of the occupier [of the land], if he die before he has actually cut, reaped, or gathered the same." On the other hand, it is broadly stated in the American and English Encyclopedia of Law, volume 4, page 887, that: "Growing crops, before maturity and unsevered from the soil, are part and parcel of the land on which they grow, and pass with a conveyance of the land." Cases almost innumerable are cited as showing that this rule obtains in nearly every state in the Union. This text is then immediately followed by the statement (p. 891) that: "Crops ripe for harvest are personal property; they pass to the executor, and not to the heir. They are liable to be seized on execution; and the officer may enter, cut down, seize, and sell the same as other personal estate." On the succeeding page it is said: "Although growing crops are part of the realty, unless severed from the soil, yet, for the purpose of levy and sale on execution, they ^{are} suffered to be treated as personalty." Again, we find it stated in 6 Lawson's Rights, Remedies, and Practice, section 2681, that "crops, until they are gathered, are things immovable, or real estate, because they are attached to the ground"; but when "crops are gathered, they become movables, or chattels personal, because they are no longer attached to the soil. . . . Corn, ripe, but standing uncut in the field, passes by deed of the freehold. Unharvested crops go to the devisee of the land, and not to the executor; but as against the heirs at law, they go to the

executor." This statement is met by the assertion to be found in 3 Ballard's Annual on the Law of Real Property, section 128, that "annual crops sown by the owner of the soil or his tenant, and which are the produce of industry and care while growing and immaturred, are personal property"; whereas, in the first volume of the same work, section 111, it is said that, "as a general rule, growing crops, which have been planted by the owner of the soil, constitute a part of the realty; but this rule is held not to apply to crops which have matured and are ready to be harvested." Mr. Kerr says: "Growing crops planted by the owner of the soil are a part of the realty, and, as a general rule, will pass with it on conveyance. . . . And this seems to be the case even though the crops are at the time standing in the field unharvested, although ripe, and the season for gathering them is long past. . . . It is the general rule that a crop growing on land at the time of a sale under execution passes to the purchaser; and the same is true on a sale under a mortgage foreclosure. . . . And growing crops are a part of the realty as between the successful plaintiff in an action of ejectment and the evicted defendant, where the crops were planted after the commencement of the action in ejectment. But the rule is otherwise where the grain was sown and harvested by one on lands to which he claimed title, and of which he was in actual possession. Crops planted by a tenant who holds under the owner of the soil are, as between ⁶³⁰ the landlord and his tenant, personal property, and the tenant has the right to remove them; they become part of the realty, however, should the tenant voluntarily abandon or forfeit possession of the premises": 1 Kerr on Real Property, secs. 50, 51. In the second volume of the same work, section 958, the author says: "Where there are annual crops upon the land assigned to a widow as her dower, which were growing at the time of her husband's death, they will belong to her, and not to the heirs or executors of the husband; but if there has been a severance by the husband, as where he has assigned the crops to pay his debts, the wife will not be entitled to have dower assigned therein." So far as the offense of larceny is concerned, Mr. Bishop says that standing grain was at common law considered as realty, and it required statutory enactment to constitute an unauthorized taking of crops larceny in the several states where such act is made a crime: 1 Bishop's New Criminal Law, sec. 577. In Preston v. Ryan, 45 Mich. 174, Justice Cooley said: "While it is quite true that the growing crops are a part of the

realty, yet for the purposes of levy and sale on execution, they are suffered to be treated as personalty." And there are numerous cases in which it has been held that where the owner of crops has undertaken to sell the same at private sale, before they matured or while ripe though ungathered, such crops, if grain or other agricultural produce raised annually, are to be treated as personalty for the purposes of such sale. The question as to whether such crops were personalty or realty, arose in considering the effect of the statute of frauds upon sales of this character. These decisions were confined, however, to sales of such crops only as were termed "emblemments" at common law: Clark on Contracts, 106. Says Mr. Kerr, in dealing with the subject: "A distinction is to be observed between *fructus naturales*, or the natural growth of the soil, such as trees, grasses, herbs, fruit on trees, and the like, which at common law are part of the soil, and *fructus industriales*, or fruits ⁶³¹ or products the result of the annual labor of man in sowing and reaping, planting and gathering, which, though strictly a part of the realty as much as those products which the soil brings forth without man's intervention, are treated as personal property for many purposes": 1 Kerr on Real Property, sec. 53. Mr. Bishop doubts much the soundness of the distinction made in regard to crops of the latter kind, but says: "The exception of deeming them personalty for most civil purposes, even while attached to the soil, is probably established too firmly in authority to be overthrown": Bishop on Contracts, sec. 1296. For a full discussion of the subject and a review of the leading cases, English and American, see Browne on the Statute of Frauds, 5th ed., sec. 235, et seq; 1 Benjamin on Sales, sec. 113, et seq; 4 Am. & Eng. Ency of Law, 893, et seq; Blackburn on Sales, 5; 1 Addison on Contracts, sec. 206; Baker on Sales, sec. 153; Tiedeman on Real Property, sec. 799; Tyler on Fixtures, 732, et seq; 3 Washburn on Real Property, 364, et seq; 2 Addison on Contracts, sec. 656, et seq; 2 Schouler's Personal Property, sec. 488, et seq; Tiedeman on Sales, sec. 59. In summing up, the author of the work last cited says: "The better opinion, independent of the authorities, would seem to be that any contract which undertakes to pass title to anything annexed to the soil, without severance, is a contract for the sale of an interest in land, whatever may be the character of the thing to be severed, and falls within the fourth section of the statute."

Anyone wishing to further entangle himself in the mystic maze of uncertainty and contradiction in which the law governing growing crops has become involved may profitably direct his attention to the legion of cases cited by the various text-writers to whom we have above referred—the field thus open to him is promising even unto distraction. Such a rich mine of abstruse legal learning is doubtless of untold value. It has not, however, proved helpful in the decision of the present case, nor led us to an understanding of the general principle underlying the ⁶³² whole subject. Indeed, we are free to confess, about the only deduction we have been able to draw therefrom is that a growing crop is a sort of legal species of chameleon, constantly changing color to meet the emergency of each particular class of cases in which the question arises whether it is to be considered as personalty or as realty. Amid all this glare of legal light, we have not been so fortunate as to find any case—or class of cases—like the present, in which this creature of the law has thus arbitrarily volunteered to assume its distinguishing hue. Like a man with many aliases, it presents itself sometimes under one name—at other times under quite another; so that we may not know how, upon special occasions, to address it. Being thus thrown upon our own resources, we feel at liberty, and shall endeavor, to classify the plaintiff's unhappy crop of cotton agreeably to our own understanding of the legal status of growing crops at common law, and without regard to the conflicting views entertained by the several authors from whom we have above quoted.

We may, in the outset, remark that, in our opinion, growing crops, before actual severance from the soil, were consistently regarded at common law as realty. Whatever incongruities may have crept into the law upon the subject as now understood in many jurisdictions we believe attributable alone to a misconception on the part of courts of the present day of the rules which governed this species of property under the feudal system prevailing in England at an early period of its history. Especially would it seem that the principle which underlies the doctrine of emblements has been too often overlooked, disregarded, misunderstood, or misconstrued. Blackstone tells us that in feudal times, when a common recovery suffered by the tenant of the freehold had the effect of annihilating all leases for years then subsisting, estates for years were necessarily of a precarious nature and of short duration: 2 Blackstone's Commentaries, 143. The hardship attending a thus sudden termination of the ⁶³³ lessee's estate before he could reap the fruits of his toil by gather-

ing his crops, appealed strongly for his protection. Relief was justly afforded by the courts upon the doctrine of emblements, designed to meet an emergency thus occasioned, whereby the tenant for years was given a right to gather that which he had in good faith planted. Not so, however, if a tenant whose term was certain sowed a crop he could not reasonably expect to be able to harvest before his term expired, or by his own act terminated his estate before his crops were matured and gathered; in the one case, because "it was his own folly to sow what he could never reap the profits of," and in the other case, because his estate terminated by reason of his own default or caprice: 2 Blackstone's Commentaries, 145. And in like manner was the doctrine applied as to tenants at will: 2 Blackstone's Commentaries, 146. It is proper to further observe that the right established by the doctrine of emblements was something more than a mere naked privilege accorded the outgoing tenant to sever from the soil his ripened crops (thus converting the same into personalty) and carry them off, along with such chattels belonging to him as might happen to be upon the premises at the termination of his estate. Growing and immature crops were also covered by this doctrine, which further gave to the tenant "the right of ingress, egress, and regress so far as needful for due attention to and gathering" the same: 1 Kerr on Real Property, sec. 652. "The right to emblements includes the right to the land to cultivate and harvest them: 6. Lawson's Rights, Remedies, and Practice, sec. 2682. So it will be seen that the effect of the doctrine was to give the departing tenant a right to the use and sustenance of the soil for a period sufficiently long to mature his crops; thus, to this extent, extending the term of his original estate, and, in consequence, depriving his successor in estate of the unrestricted use, and of all profits, of such lands as were necessary to the growing of the crops, until the same matured and were harvested.

634 If the doctrine of emblements extended no further, the tenant at will, the tenant for years, or the tenant per autre vie, would be fully protected—provided he remained in life. Otherwise, his very natural failure and omission to demand and enforce his right would inure to the benefit of his successor in estate, thus unjustly depriving the family and creditors of such tenant of the fruits of his toil. Neither creditors nor his heirs could enter upon the land and gather the crops without committing trespass, were this a right restricted to the tenant himself; although, had the tenant himself exercised this right before his

death, his heirs and creditors could have gained a just benefit and advantage by reason of such exercise, the result of which would have been to convert the crops into personalty and render the same capable of due administration and distribution agreeably to law. But this emergency was foreseen. The maxim of the law, *Actus Dei nemini facit injuriam*, was invoked, and the representatives of the deceased tenant were given the right to enter upon the land and gather the crops, after which, of course, having thus become converted into personal estate, they were subject to administration as such: See 2 Blackstone's Commentaries, 122. Subsequently, the doctrine of emblements was still further extended to include crops planted by a tenant in fee who died before time for harvest, principally for the protection of creditors: 2 Blackstone's Commentaries, 404. And with much reason; for, as against creditors, the heirs to the inheritable estate had no just claim to profits derived therefrom before he succeeded to its possession—certainly not when, indeed, his ancestor may have been enabled to plant and tend such crops solely by reason of credit extended to him by such creditors.

The whole doctrine of emblements was based upon two reasons: 1. Upon natural justice and equity; 2. Upon grounds of public policy. The substantial merit of the first reason assigned is apparent; how public policy was subserved by an application of the doctrine is explained by ⁶³⁵ Blackstone when he says, "the encouragement of husbandry, . . . being a public benefit, tending to the increase and plenty of provisions, ought to have the utmost security and privilege that the law can give it": 2 Blackstone's Commentaries, 122. We have already shown that where the reason of the doctrine fails, it has no application; as where, for instance, a tenant terminates his estate through his own default or misconduct. In such case, the law, as it existed prior to the establishment of this doctrine, was suffered to apply in all its rigor, whereby a growing crop, until actually severed from the soil, was regarded as a part of the land itself, and passed accordingly. That this is true is evidenced by the fact that the courts of England have uniformly held that at common law growing crops were not considered personalty before severance, and were, therefore, not the subject matter of larceny: 1 Bishop's New Criminal Law, sec. 577; 2 Bishop's Criminal Law, 7th ed., sec. 763; 12 Am. & Eng. Ency. of Law, 781, 782, and notes; 2 Blackstone's Commentaries, 404. Indeed, if, at common law, standing crops were regarded as personal property, the doctrine of emblements was needlessly devised, so far, at least,

as ripened, though ungathered, crops were concerned. For we apprehend it was always the right of a tenant, upon a sudden and unexpected termination of his estate, to demand a reasonable time within which to gather up his household goods and other personal effects before vacating the premises; and if his ungathered crops constituted a part of his chattels, he would have a reasonable time in which to gather and carry them away. The truth of the matter is, however, that before the introduction into the law of the doctrine of emblements, the tenant had no right to the usufruct of the land a single day beyond his term, nor to any profits thereof not arising strictly within the period of his right of occupancy. Consequently, after his estate had become fully determined, he would have no better right to claim standing crops than he would plough-bote; although, had he gathered his crops ^{etc} or exercised his right as to plough-bote before the expiration of his term, his right to carry the one or the other off as personalty would certainly exist. The doctrine of emblements is based, and proceeds solely, on the idea that the tenant is justly entitled to gather his crops even though his term has expired, and without regard to whether such crops are to be considered as in the nature of personalty or realty. Nor is the fact that at common law the executor of a deceased tenant was entitled to claim emblements any test as to the legal character of such crops while yet standing in the field. Herein we disagree with the conclusion drawn by Mr. Freeman and other writers. Formerly, under the common-law rules of succession, the title to crops unsevered from the soil could not pass into the executor. Under the doctrine of emblements, however, he was given the right to enter upon the land, in the name of the deceased tenant, and convert the crops into personalty by gathering the same and carrying them away; whereby the rules of succession governing personalty were given opportunity to ultimately take effect upon this species of property.

Again, as has been seen, many text-writers call attention to the fact that, at common law, an execution could be levied on a growing crop—evidently regarding this as persuasive authority for the statement that such crops were considered personalty. In this view we cannot concur. As is well known, under the feudal system, alienation or encumbrance of estate was strictly prohibited. Even a tenant in fee had no power to sell, mortgage, or otherwise encumber the estate of inheritance held by him. And so long as this restraint upon alienation continued, the owner in fee was, in effect, no more than a life tenant. Creditors

had, therefore, to look solely for payment to property of their debtor in which he could, because having a right under the law to alienate the same, claim an unqualified and exclusive interest, and as to which the heir to the inheritable estate had no vested rights. Crops raised by the ⁶³⁷ tenant in fee, being profits arising from the estate of freehold to which he was solely entitled, were, of course, no part of the inheritance. They were, therefore, held subject to his debts—not upon the idea that they were personalty rather than realty—but upon the theory that they were a species of property in which the debtor had an unqualified and exclusive ownership. We believe the doctrine that all the property of a debtor, of every kind and description, of which he is sole owner, should justly be held subject to the payment of his debts, obtains even in this degenerate day. In this regard we find no inconsistency in the common law as to its treatment of growing crops as realty. On the contrary, the distinction between this class of property and mere chattels belonging to the debtor seems to have been strictly observed. The writ of fieri facias was restricted in its operation to the seizure of the “goods and chattels” of the debtor. To reach the profits of his lands (which consisted chiefly of crops grown thereon or rents issuing therefrom), the writ of levari facias was requisite, which writ remained in use until the writ of elegit (established by statute), conferring greater rights upon creditors, naturally displaced it in general practice: 3 Blackstone’s Commentaries, 417-420. It is, perhaps, proper to note in this connection, that, by special enactment of this state (Code, sec. 3642), it is provided that growing crops shall be exempt from levy and seizure under execution until “matured and fit to be gathered,” unless the debtor absconds or removes from the county or state. The purpose of this statute was merely to provide against a sacrifice of the debtor’s property. In view of the fact that realty, as well as personalty, is subject in this state to seizure under execution, it would, of course, be absurd to draw the conclusion that this change in the law as previously existing was a recognition that at common law growing crops were considered personalty, and that the effect of the statute was to give such crops the character of realty.

⁶³⁸ We think the whole troublesome subject is pretty satisfactorily explained and relieved of much difficulty by the following extract which we take from 2 Blackstone’s Commentaries, 404. Says Blackstone: “Emblements are distinct from the real

estate in the land, and subject to many, though not all, the incidents attending personal chattels. They were devisable by testament before the statute of wills, and at the death of the owner shall vest in his executor and not his heirs; they are forfeitable by outlawry in a personal action; and by the statute 11 George II, chapter 19, though not by the common law, they may be distrained for rent arriere. The reason for admitting the acquisition of this special property by tenants who have temporary interests was formerly given; and it was extended to tenants in fee, principally for the benefit of their creditors; and therefore, though the emblements are assets in the hands of the executor, are forfeitable upon outlawry, and distrainable for rent, they are not in other respects considered as personal chattels; and, particularly, they are not the object of larceny, before they are severed from the ground." We understand this distinguished writer to mean, when he says "emblements are distinct from the real estate in the land," that they constitute no part of the inheritance, as between the heir thereto and the legal representatives of the tenant in fee, but are to be regarded as merely profits arising out of the land, rather than an integral part of the land itself considered as a vested estate; or, as between a lessee and the owner of the freehold estate, that emblements never become attached to the land in such manner as to constitute a permanent part of the realty comprising such freehold estate, but, as profits to which the lessee alone is entitled, are distinct from the land itself, and vest exclusively in him. In fact, the doctrine of emblements was designed for the very purpose of effecting such a separation, and declaring emblements "distinct" from the "real estate in the land," no matter in whom such estate vested ⁶³⁹ by reason of the sudden expiration of the tenant's term. It will be noted that Blackstone does not say that growing crops are distinct from the land upon which they are grown, but only that they are so after they become "emblements." Of course, where the doctrine of emblements has no application, growing crops cannot be considered as "emblements" at all. As, for instance, when at the present day the owner of land in fee simple has an unqualified and exclusive interest therein, himself plants the crops and remains in undisturbed possession of the premises, no such distinction between the land and unharvested crops growing thereon is properly to be considered. Thus, it is the almost universal rule in this country that where such owner voluntarily sells his lands without expressly reserving a right to enter and gather growing crops planted thereon, such crops are to be re-

garded as realty, and, as such, pass to the purchaser: See the collection of cases cited in 4 Am. & Eng. Ency. of Law, 887.

It will further be observed that Blackstone seems very studiously to avoid characterizing even "emblems" as personalty, but, very happily, we think, remarks instead that they are "subject to many, though not all, the incidents attending personal chattels." And herein we believe he has struck the keynote explaining how, in later times, growing crops have come to be considered personalty, simply because, the law having placed upon them many incidents common alike to chattels, no reason ordinarily exists for observing their true status as realty; and therefore the distinction which really still survives between them and mere chattels has not been clearly and consistently kept in view. Under various rules of law, many "incidents" attend, and are alike common to, both real and personal property. For instance, a new and special tax upon property might be laid upon both realty and personalty, irrespective of their inherent character, and yet this would really make them no closer kin than they were before. We have already ^{§40} seen that at common law, while estates of inheritance were not subject to be levied on under execution, growing crops were held liable for the claims of creditors, simply because the exclusive ownership of such crops was vested in the debtor, and the heir to the inheritance had no interest therein. As crops raised by the debtor were, perhaps, the only species of realty of which this was true, and as all chattels were held subject to execution, it is not strange that, in course of time, the impression should take root in the minds of those not familiar with or not recalling the history of this rule of law and the reasons upon which it was based, that no distinction existed between these two kinds of property, especially as in other respects no difference in the treatment of either was observed.

That growing crops were subject to forfeiture upon outlawry may likewise be explained upon the idea suggested why crops were subject to execution, viz., that the debtor had an alienable, and therefore, exclusive, interest therein. In the initial or preliminary proceedings to outlawry, if the recreant debtor persistently failed to obey the summons of the court, a writ was issued "commanding the sheriff to distrein the defendant from time to time, and continually afterward, by taking his goods and the profits of his lands, which are called issues, and which he forfeits to the king if he doth not appear": 3 Blackstone's Com-

mentaries, 280. So it will be seen that his crops were reached and forfeited, not as chattels, but as "profits of his lands."

We have already explained how emblements came to be vested in the executor, instead of descending to the heir. The remaining "incident" referred to by Blackstone, viz., that emblements "were devisable by testament before the statute of wills," will readily be understood as a natural sequence of the doctrine of emblements. As thereunder the executor was empowered to reduce his testator's crops to possession, the latter could very properly direct in his testament what disposition should be made of the same ⁶⁴¹ after they had been so reduced to the executor's possession and had thereby become converted into personality belonging to the testator's estate.

We shall not, in the present case, undertake to enter upon any discussion of the effect of the statute of frauds upon private sales of growing crops made by the owner thereof, preferring to make no attempt to successfully cross this dangerous legal bridge until necessity brings us to it. As it would appear an unpromising and impracticable task to try to reconcile the many decisions, English and American, in which this question has been dealt with and discussed, we could hope to gain no fuller light as to how, in point of fact, growing crops were classified at common law. So we may dismiss the topic by merely remarking that if, "for the purposes of such sales, emblements are suffered to be treated as personality," the case with which we are now dealing does not fall within this exception to the general rule; nor, indeed, within any other of the "exceptions" referred to by text-writers, or of which we are aware.

We cannot refrain from remarking, in this connection, the embarrassment we have experienced arising out of the practice, which seems to have sprung up in some jurisdictions, of arbitrarily regarding growing crops as personality for one purpose, and as realty for another. In the very nature of things, this species of property, being tangible in form and possessing many marked inherent characteristics, is capable of being properly classified, and should be given a fixed legal status. Of course, where there is no imperative necessity for strictly observing and remarking the distinction existing between two entirely different species of property—as where rules of law operating alike upon either class are merely to be construed and enforced—no vicious consequence or positive harm immediately results from "treating" them as though they were identical in character, or even in inaccurately

styling something "personalty" ⁶⁴² which should properly be referred to as "realty." But the importance of preserving, if possible, absolute consistency in the entire fabric of our law—thus rendering the same unequivocal, and therefore more readily and more clearly comprehended—should by no means be overlooked. The justice of this critical observation is evidenced by the utter confusion in which we find the law upon the subject with which we are now dealing to be involved.

That growing crops cannot properly be "treated" as personality under the law as understood in this state seems indisputable in view of the definition of realty contained in section 2218 of the code, which purports to be declaratory of the common law, and which reads as follows: "Realty, or real estate, includes all lands and the buildings thereon, and all things permanently attached to either, or any interest therein or issuing out of, or dependent thereon." Following this definition, it was held in *Coody v. Gress Lumber Co.*, 82 Ga. 793, that: "Trees growing upon land constitute part of the realty; and a sale of them, under the statute of frauds, must be in writing." And in *Frost v. Render*, 65 Ga. 15, wherein it appeared that a sheriff sold under execution land upon which was growing a crop of cotton, it was held that: "A levy being on certain land as the property of the defendant in fieri facias, a sale under such levy carries with it the crop growing on the land, and the sheriff cannot limit the sale by an announcement that the rent of the current year is reserved"; for the reason that the law considers growing crops part and parcel of the land itself, following its ownership as a mere element of value incident thereto. This is certainly the general rule which obtains in this state, and we know of no exceptions thereto which have gained any foothold in our law on the subject. A review of the decisions previously rendered by this court in cases wherein the question as to the legal character of growing crops arose shows that they are all in harmony with the conclusion reached in ⁶⁴³ the present case. In *Pitts v. Hendrix*, 6 Ga. 452, it was held that: "A growing crop of corn, after it is laid by, and before maturity, passes to the purchaser of the land." This case was cited and followed in *Ferguson v. Hardy*, 59 Ga. 758, wherein the question arose as to whether the title to crops growing on lands sold under execution passed to the purchaser, as against the defendant in fieri facias. In the more recent case of *Dollar v. Roddenbery*, 97 Ga. 148, the question was presented whether such a purchaser also acquired title as against a tenant who planted the crops, and whose estate was terminated thus suddenly

by a sale of the lands; and, upon the doctrine of emblements, this question was decided in the negative. This decision was, of course, rendered without regard to whether the crops were to be considered as personalty or as realty, being based solely upon the idea that the tenant was entitled to the crops as "emblements," which, even though a part of the realty, were nevertheless not included in the sale of the land; for no greater interest than the landlord had therein could be sold under execution as his property, and, of course, the purchaser got only that which was in fact sold.

Again, in the case of *Scolley v. Pollock*, 65 Ga. 339, wherein there was a contest between a judgment creditor of a tenant and one who claimed cotton levied on by virtue of a prior purchase from the tenant of his immatured crop, and who had accordingly entered upon the land, cultivated the crop and harvested it when ripe, the decision in *Pitts v. Hendrix*, 6 Ga. 452, was cited approvingly, and it was further said: "Before maturity, the crops only constitute an element of value, and are not themselves distinct chattels. We know of no ruling to the contrary by this court."

There only remains to be noticed the decision in *Hamilton v. State*, 94 Ga. 770, wherein the accused was charged with having fraudulently sold and disposed of personal property upon which she had previously given a mortgage, contrary to the provisions of section 4600 of the code. The ⁶⁴⁴ indictment against her alleged that, having mortgaged her crops in May, she, in the following November, fraudulently sold and disposed of the same without the consent of the mortgagee, and with intent to defraud him, whereby he sustained loss. The point was raised that a mortgage given upon a growing crop could not properly be regarded as a mortgage upon personalty. The decision of the court in that case was pronounced by the writer of this opinion. In dealing with the question thus raised, the distinction drawn between growths that are *fructus naturales* and those termed *fructus industriales* was stated and to a limited extent discussed, Corbin's *Benjamin on Sales*, volume 1, section 126, and note to *Norris v. Watson*, 55 Am. Dec. 162, being referred to as showing that this distinction had been recognized and followed by many courts of high repute. The subject did not then, however, receive the careful and laborious investigation which this opinion evidences; and it was not necessary, for we did not rest our decision on the ground that the crops were to be deemed personalty at the time the mortgage upon the same was given, but called

attention to this widely recognized distinction merely as persuasive argument tending to show that in any view of the case the conviction of the accused was right. As will be perceived from the concluding remarks of the opinion then delivered, the ground upon which we rested our decision was, that whatever might be the character of the crops when mortgaged, if the accused fraudulently disposed of the same after maturity, so that they were removed from the land and carried beyond the reach of the mortgagee, the offense with which she was charged would unquestionably be complete. The record before us did not disclose whether she gathered the crops herself, and afterward carried them off and sold them, or whether the sale took place while the crops yet stood, ripe but ungathered, in the field. But we did not then, nor do we now, think this would make any difference. Even in the latter event, the ⁶⁴⁵ produce of these matured crops being the subject matter of sale, and their separation from the land being necessarily contemplated and included in the terms of sale, severance from the soil would be an essential incident to an effectual delivery; and until actually delivered, the sale would remain executory and incomplete. Unquestionably, the lien of the mortgage adhered to the crops as effectually after severance as before: 1 Cobbey on Chattel Mortgages, sec. 380. "A mortgage of a growing crop follows the matured and harvested grain": 1 Cobbey on Chattel Mortgages, sec. 381. And a mortgage lien on a crop is not lost by any natural change in its condition: 1 Cobbey on Chattel Mortgages, sec. 379. Therefore, we concluded that, irrespective of whether such crops should properly be considered as personalty while yet immatured and growing in the field, "the crop in question being personalty when sold and being then subject to the mortgage, it does not matter whether it was personalty or not at the time it was mortgaged."

The foregoing comprises all the cases of which we have any knowledge in which this court has dealt with the subject presented by the case at bar.

In the foregoing discussion, we have faithfully endeavored to dissipate the darkness which overhangs and envelops the subject at the present day, and to show that at common law no inconsistency in the treatment of growing crops as realty in fact existed, even though emblements were subjected to many of the incidents which attached to chattels. Whether or not this attempt has been successful, we leave to the reader to determine. That the proper result in this particular case has been reached,

we are entirely convinced, and cannot regard as even debatable. The plaintiff was the owner, not only of the crop destroyed, but also of the land upon which it was growing. His crop, therefore, cannot possibly fall within the term "emblemata," nor properly be considered as even constructively constituting a species of property distinct from the land ⁶⁴⁸ upon which it was growing at the time it was destroyed by fire.

3. Our conclusion, therefore, is that the justice's court had no jurisdiction to entertain the plaintiff's action. In reaching this result, we have endeavored not to be unduly swayed in our judgment by the importance of this particular case, nor deterred by the thought of the consequences which must inevitably ensue. After deliberate reflection, and after a most painstaking investigation of the law, we are constrained to hold that the recovery of six dollars which the plaintiff obtained in the magistrate's court cannot legally be upheld.

Judgment affirmed.

FIXTURES—WHAT ARE—INTENTION.—One of the requisites to convert a chattel into part of the realty is the intention of the party making the annexation to make a permanent accession to the freehold: *Feder v. Van Winkle*, 53 N. J. Eq. 370; 51 Am. St. Rep. 623, and note. See extended note to *Lavenson v. Standard Soap Co.*, 13 Am. St. Rep. 153-156, and note to *Lansing etc. Works v. Walker*, 30 Am. St. Rep. 491.

JUSTICE OF THE PEACE—JURISDICTION.—The justice's courts of Texas are, within their defined limits, tribunals or general jurisdiction, and all reasonable presumptions are indulged in support of the validity of their judgments: *Heck v. Martin*, 75 Tex. 469; 16 Am. St. Rep. 915, and note. See, also, *Weaver v. Nugent*, 72 Tex. 272; 13 Am. St. Rep. 792, and note; *Smith v. Perkins*, 81 Tex. 152; 26 Am. St. Rep. 794; *Smith v. Clausmeier*, 136 Ind. 105; 43 Am. St. Rep. 311, and note.

BURNLEY v. SAVANNAH GROCERY COMPANY.

[98 GEORGIA, 711.]

PARTNERSHIP — HUSBAND AND WIFE.—A married woman may engage in business with her husband as a copartner, provided such partnership is bona fide and actual, and not merely colorable. It cannot be used as a mere device for rendering the wife liable for, or subjecting her property to, the payment of the debts of her husband.

PARTNERSHIP—HUSBAND AND WIFE—LIABILITY OF WIFE.—If a partnership exists between husband and wife, and she is held out to the world as one of the partners, she is liable to one who deals with the firm upon the faith of her membership.

PARTNERSHIP—HUSBAND AND WIFE.—Secret stipulations in partnership articles between husband and wife, limiting the wife's liability as a member of the firm, are not binding upon innocent third persons who contract with the partnership. One who extends credit, upon the faith of her full membership in the firm, is entitled to hold her responsible just as if she were a man or a feme sole.

Action of account. D. H. Burnley, his wife, and son, in August, 1892, entered into a partnership to carry on business under the firm name of Burnley & Co. Notice of the partnership was published, and business was carried on under such firm name until January, 1895, Burnley and the son being active managers. At the latter date, the partnership assets were assigned by the partners to one Solomon, in trust for the benefit of creditors, and the business was discontinued. The trust deed admitting the existence of the partnership was executed by Mrs. Burnley and by the other members of the firm. The firm being indebted to plaintiff for goods purchased, he brought this action against the partnership and each of the members thereof. Mrs. Burnley alone defended. She admitted that she had signed the partnership agreement, and that her name was used as a copartner, but contended that in law she could not be a partner with her husband so as to bind her separate estate. The partnership agreement between Burnley and his wife contained secret stipulations, not known to plaintiff, to the effect that Burnley was to have the full management and control of the business, and to assume all liabilities of the firm, and that Mrs. Burnley's interest in the firm and its business was to extend only so far as to allow her name to be used for the security and accommodation of the firm. Judgment for plaintiff, and defendant excepted.

G. W. Brantley, for the plaintiff in error.

W. M. Toomer, for the defendant in error.

⁷¹² LUMPKIN, J. 1. This case turns upon the question whether or not, in this state, a married woman may engage in business with her husband as a copartner. In *Francis v. Dickel*, 68 Ga. 255, it was put in the form of a query: "Can a wife be her husband's partner in business?" We think this question was answered affirmatively by the principle laid down in *Schofield v. Jones*, 85 Ga. 816, 825. After a careful examination of all our statutes and many decisions, we have reached the conclusion that there is no law ⁷¹³ or public policy in Georgia which forbids such a partnership, provided, always, it is bona fide and actual, and not merely colorable. An alleged partnership cannot be used as a mere device for rendering the wife liable for, or subjecting her property to the payment of, debts of her husband. But if they really engage in a business as actual partners, we see no reason why the partnership should not be regarded as a lawful one. The "woman's law" of 1866 went far toward the emancipation of married women. The only restrictions left upon their power to contract were designed for their protection and benefit. In all cases where these restrictions do not apply, they are as free to contract as men; and no one of these restrictions, so far as we have been able to ascertain, prevents a married woman from engaging in a partnership business either with her husband or with another. There are many kinds of business in which she is calculated to make an excellent partner, and one who is likely to contribute to the success of the enterprise. The whole matter is summed up in the following quotation from the opinion of Chief Justice Bleckley in the case last cited: "There is nothing contrary to public policy in allowing husband and wife to unite their joint credit in procuring the means of supplying joint resources in the shape of a home, or a place of business from which to derive an income for the support of the family. Very often it would contribute to the well-being and prosperity of both, and to the permanent good of the family. No doubt such a power can be abused and misapplied, but this is no reason for not recognizing its existence, or why the law should not tolerate it, if on the whole its results are beneficial rather than pernicious. At all events, we think the power exists at present under our law."

2. Conceding that a wife may lawfully enter into a partnership with her husband, secret stipulations in the partnership articles, by which her liability as a member of the partnership is limited, can no more in her case than in any ⁷¹⁴ other be made binding

upon innocent third persons who contract with the partnership in ignorance of these stipulations. One who extends credit upon the faith of her full membership in the firm is entitled to hold her responsible just as if she were a man or a feme sole.

Judgment affirmed.

HUSBAND AND WIFE—PARTNERSHIP BETWEEN.—A married woman cannot become a partner with her husband in a mercantile business, though the statute declares that a married woman may bargain, sell, and transfer her personal property, and carry on any trade or business on her sole and separate account, and that her earnings from her trade, business, labor, or services shall be her sole and separate property and may be invested by her in her own name, and she may alone sue and be sued in the courts of the state on account of such property, business, and services: *Gilkerson-Sloss Commission Co. v. Sallinger*, 56 Ark. 294; 35 Am. St. Rep. 105; *Board of Trade v. Hayden*, 4 Wash. 263; 31 Am. St. Rep. 919, and extended note. See, also, note to *Vall v. Winterstein*, 34 Am. St. Rep. 339.

PARTNERSHIP—LIABILITY OF ONE HELD OUT AS A PARTNER—HUSBAND AND WIFE.—Except when one allows the public or individual dealers to be deceived by the appearances of partnership when none exists, he is never to be charged as a partner, unless, by contract and with intent, he has formed a relation in which the elements of a partnership are to be found: *Webster v. Clark*, 84 Fla. 637; 43 Am. St. Rep. 217, and note. As to a wife's liability where she is held out as the partner of her husband, see extended note to *Board of Trade v. Hayden*, 31 Am. St. Rep. 935.

PARTNERSHIP—SECRET AGREEMENT BETWEEN PARTNERS—EFFECT OF.—Any private agreement between partners, or limitation placed upon the authority of a partner by whom the business is conducted, is of no avail against a creditor who has contracted in ignorance of it: Extended note to *Hahlo v. Myer*, 22 Am. St. Rep. 760. See, also, *Baxter v. Rollins*, 90 Iowa, 217; 48 Am. St. Rep. 432.

CASES
IN THE
SUPREME COURT
OF
INDIANA.

SCOTT v. RUNNER.

[146 INDIANA, 12.]

JUDGMENTS—INJUNCTION AGAINST.—The process of one court cannot be used to enjoin the final process of another court of equal and concurrent jurisdiction, although the judgment on which such final process is based is void.

Moon & Wolf, for the appellants.

G. P. Haywood and C. A. Burnett, for the appellee.

¹² **McCABE, J.** This was a suit brought by the appellee in the Jasper circuit court against the appellant Scott, and appellant Hanley, sheriff of Jasper county, to enjoin the execution of an order of sale of certain real estate, situate in Jasper county, which order was made in attachment proceedings and judgment in favor of appellant Scott in the Howard circuit court.

The first question we are confronted with is: "Did the Jasper circuit court have jurisdiction? If it did not, that will end this case. In *Indiana etc. R. R. Co. v. Williams*, 22 Ind. 198, 200, it was held that no court in this state can rightfully enjoin a party from proceeding in a suit in another court of this state having equal power to grant the relief sought by the complaint on which such injunction is asked. ¹³ To the same effect are *Gregory v. Perdue*, 29 Ind. 66, and *Board etc. of Vigo County v. Stout*, 136 Ind. 53.

But it is insisted that it appears from the complaint and evidence that the Howard circuit court had no jurisdiction, and hence the rule established by these cases does not apply, because, in such event, it is contended that the judgment is void, or rather that there is no judgment or order of the Howard circuit court. In *Plunkett v. Black*, 117 Ind. 14, the attempt was made

in the Montgomery circuit court to enjoin the collection of an execution in the hands of the sheriff of Montgomery county, issued on a judgment recovered in the Parke circuit court.

It was there said: "The last question we care to consider is, Had the Montgomery circuit court jurisdiction of the subject matter of the action? Our conclusion is, that it had not. . . . The Parke circuit court was a court of equal jurisdiction to that of the Montgomery circuit court. The execution, the service of which the appellee sought to enjoin, was the process of that court. The rule is settled in this state that one court cannot control the execution of the orders and process of another court of equal jurisdiction: *Indiana etc. R. R. Co. v. Williams*, 22 Ind. 198; *Gregory v. Perdue*, 29 Ind. 66; *Coleman v. Barnes*, 33 Ind. 93; *Wiley v. Pavey*, 61 Ind. 457; 28 Am. Rep. 677."

The same decision of the question was again made when the same case was again in this court: *Black v. Plunkett*, 132 Ind. 599.

It is, however, urged in argument that if the Howard circuit court had no jurisdiction then there was no order of that court to enjoin. But before that conclusion can be reached, the Jasper circuit court must have jurisdiction to institute the judicial inquiry. That requires jurisdiction to interfere with the process ¹⁴ of another court of equal jurisdiction, and that we have seen it has not the power to do.

It is true that whenever a judgment is made the foundation of a right in another action in any court, whether in the court in which the judgment was rendered, or in some other court, if it appear to have been rendered without jurisdiction it may be collaterally impeached and disregarded, because it is no judgment. There are numerous ways in which such judgment may be brought in question other than attempting to enjoin the execution of the process of the court rendering it. The question here is not, as counsel seem to suppose, whether the judgment can be collaterally impeached, but it is whether the process of one court can be used to enjoin the final process of another of equal jurisdiction.

Counsel for appellee say why not, if the judgment on which that final process is based is void? The answer is, that that court has ample power to enjoin its own process without coming into conflict with the process of another court of equal power, and the presumption is, that it will correctly administer the law if applied to, and if it does not, an appeal to a higher court will correct its errors and thus avoid all conflicts between courts of

co-ordinate power. Otherwise, there must be even physical conflicts between courts of equal power in the state. The Howard circuit court may adhere to its opinion tenaciously that it had jurisdiction and require its officer, the sheriff of Jasper county, to execute its order of sale, and the Jasper circuit court may be of opinion that the Howard circuit court had no jurisdiction, and require its officer, the coroner of Jasper county, to execute its order to restrain and prohibit the execution of the order from the Howard circuit court. In such a case ¹⁵ which order must prevail? It must depend upon a mere question of superiority of physical force.

The law does not allow the rights of parties to be determined in that way.

An eminent author says: "The rule is that one court of concurrent jurisdiction has no power to interfere with the judgments or decrees of other courts of the same jurisdiction. Therefore, one court of co-ordinate jurisdiction will not restrain, by injunction, proceedings previously instituted in another court. And the rule extends to the processes of the court, whether *mesne* or *final*": Works on Courts and Jurisdiction, sec. 17, p. 69.

In *Platto v. Duester*, 22 Wis. 484, Chief Justice Dixon, speaking for the supreme court of Wisconsin, said: "Can the execution of an order or judgment in equity in one of the circuit courts of this state be restrained by injunction, issued in an action subsequently commenced in another circuit court? Such is the question presented in this case; and I apprehend, both on principle and authority, that the power thus claimed does not exist; or if it does, that it ought never to be exercised. It is easy to see the great confusion and endless trouble and litigation which might ensue from the exercise of such a jurisdiction. The impropriety, I might say the utter absurdity, of applying to one court to restrain, modify, or correct the orders or decrees of another court of co-ordinate jurisdiction, is also apparent. I think it is wholly inadmissible to do so."

In *Anthony v. Dunlap*, 8 Cal. 26, it is said: "We have before decided that one court had no power to interfere with the judgments and decrees of another court of concurrent jurisdiction. The only case in which it will be allowed is where the court in which the action or proceeding is pending is unable, by reason of its ¹⁶ jurisdiction, to afford the relief sought. Any other rule would lead to inextricable confusion."

To the same effect are *Rickett v. Johnson*, 8 Cal. 34; *Grant v. Quick*, 5 Sand. 612; *Uhlfelder v. Levy*, 9 Cal. 607; *Wilson v. Baker*, 64 Cal. 475; *Dodge v. Northrop*, 85 Mich. 243; *Ex parte Bushnell*, 8 Ohio St. 599.

As the Howard circuit court had ample power to afford all the relief to which appellee was entitled without coming in conflict with any other court of equal power, the Jasper circuit court had no jurisdiction.

The judgment is reversed and the cause remanded, with instructions to dismiss the case for want of jurisdiction.

JURISDICTION—COURTS OF CONCURRENT—INJUNCTION.—If a court of law has first acquired jurisdiction and decided a case, where courts of law and equity have concurrent jurisdiction, a court of equity will not interfere to set aside the judgment, unless the party has been prevented by some fraud or accident from availing himself of the defense at law: *Dutil v. Pacheco*, 21 Cal. 438; 82 Am. Dec. 749; *Merrill v. Lake*, 16 Ohio, 373; 47 Am. Dec. 377, and note. See, also, *Gay v. Brierfield Coal etc. Co.*, 94 Ala. 303; 33 Am. St. Rep. 122, and note, and extended note to *Plume etc. Mfg. Co. v. Caldwell*, 29 Am. St. Rep. 310-318.

LOUISVILLE, NEW ALBANY, AND CHICAGO RAILWAY COMPANY v. KEEFER.

[146 INDIANA, 21.]

CARRIERS—CONTRACTS LIMITING LIABILITY FOR NEGLIGENCE.—A railroad company while performing its duty as a common carrier, cannot protect itself by contract from liability for negligence to a passenger.

CARRIERS—EXPRESS MATTER AND MESSENGERS—CONTRACTS EXEMPTING FROM LIABILITY.—A railway company, while carrying goods for an express company under special contract, is a private and not a common carrier, and may, by contract between the express company, its messengers, and itself, exempt itself from liability for injury to such messengers, however caused, while they are in charge of express matter on its trains.

Baker & Daniels and *Davis & Moffett*, for the appellant.

Matson & Giles, for the appellee.

²² **MONKS, C. J.** Appellant was employed as an express messenger by the American Express Company, which was carrying on the express business over the road of appellant between Bedford and Switz City, Indiana. While so employed and engaged in his usual duties on the express car of said train, the place provided by appellant for him to ride, he was injured by

the falling of appellant's railroad bridge, and brought this action against appellant to recover damages therefor. A demurrer to the complaint for want of facts was overruled. Appellant answered in three paragraphs, and appellee's demurrers to the second and third of said paragraphs were sustained. The case was tried by a jury and a verdict returned in favor of appellee, and over a motion for a new trial judgment was rendered against appellant. The action of the court in overruling the demurrer to the complaint and in sustaining the demurrer to the second and third paragraphs of answer is assigned as error. It is first insisted that the court erred in overruling the demurrer to the complaint. While the allegations are not as specific and complete as they should have been made, ²³ we have concluded that the complaint is sufficient on demurrer.

The third paragraph of answer avers that the appellee was, at the time of the injury, upon the train and in the express-car as a messenger of the American Express Company, in charge of its express matter then therein; that he had not paid or tendered fare or compensation for his carriage, nor had he agreed to pay; that his right to be upon the train was secured to him and to the express company by a contract in writing between the railroad company and the express company, and that he was then riding upon the train in pursuance of the contract and not otherwise, and that the only compensation the railroad was to receive was the compensation to be paid by the express company, under the contract for the express privileges granted it thereby. It is also alleged that appellee, in consideration of his employment by the express company, and at the time thereof, executed a contract in writing—which is set out in the answer—in which appellee covenanted and agreed as follows:

"And whereas, such express company, under its contracts with many of the corporations and persons owning or operating such railroad, stage, or steamboat lines, is or may be obligated to indemnify and save harmless such corporations and persons from and against all claims for injuries sustained by its employés. Now, therefore, in consideration of the premises and of my said employment, . . . I do hereby assume all risks of accidents and injuries which I shall meet or sustain in the course of my employment, whether occasioned or resulting by or from the gross or other negligence of any corporation or person engaged in any manner in operating any railroad or vessel or vehicle, or of any employé of any such corporation or person otherwise, and whether ²⁴ resulting in my death or otherwise. And I do

hereby agree to indemnify and save harmless the American Express Company of and from any and all claims which may be made against it at any time by any corporation or person under any agreement which it has made, or may hereafter make, arising out of any claim or recovery upon my part or the part of my representatives, for damages sustained by reason of my injury or death, whether such injury or death result from the gross negligence of any person or corporation or of any employé of any person or corporation or otherwise.

"And I hereby bind myself, my heirs, executors, and administrators with the payment to such express company, upon demand, of any sum which it may be compelled to pay in consequence of any such claim, or in defending the same, including all counsel fees and expenses of litigation connected therewith. I do further agree that in case I shall at any time suffer any injury, I will at once, without demand, and at my own expense, execute and deliver to the corporation or person owning or operating the railroad, stage, or steamboat line upon which I shall be so injured, a good and sufficient release, under my hand and seal, of all claims, demands, and causes of action arising out of such injury, or connected with or resulting therefrom.

"I do hereby ratify all agreements heretofore made by said express company with any corporation or persons operating any railroad, stage, or steamboat line in which such express company has agreed in substance that its employés shall have no cause of action for injuries sustained in the course of their employment upon the line of such contracting party, and I agree to be bound by each and every such agreement in so far as the provisions thereof relate to injuries sustained by employés of the company are concerned, as fully as ²⁵ if I were a party thereto. And I do hereby authorize and empower said express company at any time while I shall remain in its service, to contract for me and in my behalf, in its own name or in mine, with any corporation or person operating any railroad, stage, or steamboat line, for my transportation as messenger or employé, free of charge, upon the condition and consideration that neither I nor my personal representatives nor any person claiming under me, will make any claim for compensation because of any injury sustained by me, whether resulting from the gross negligence of such corporation or persons, or of any employé of such corporation or persons or otherwise, and the contracts so made shall be as binding and obligatory upon me as if signed and delivered by me. And I do further agree that the provisions of this agree-

ment shall be held to inure to the benefit of any and every corporation, and to all persons upon whose railroads, stage, or steamboat lines the American Express Company shall forward merchandise, as fully and completely as if made directly with such corporation or persons."

That under the contract between the express company and appellant, said express company was granted express privileges and facilities on the railroad lines of appellant, and the express company agreed with appellant that, "It is mutually understood and agreed by and between the parties hereto that the express company will assume all risks and damages to its property, freight, and valuable packages, and also, assume all risks and damages to its agents and messengers on the said road."

Appellee insists that a common carrier cannot protect itself by contract from liability for negligence to a person riding as appellee was on appellant's train,²⁸ for the reason that such a contract is void as against public policy.

This is a correct statement of the law in this state where the carrier is at the time performing a duty it owes to the public as a common carrier. A common carrier may, however, become a private carrier or bailee for hire where, as a matter of accommodation or special engagement he undertakes to carry something which it is not his business to carry: *Railroad Co. v. Lockwood*, 17 Wall. 377; *Coup v. Wabash etc. Ry. Co.*, 56 Mich. 111; 56 Am. Rep. 374; *Robertson v. Old Colony R. R. Co.*, 156 Mass. 525; 32 Am. St. Rep. 482; *Chicago etc. Ry. Co. v. Wallace*, 66 Fed. Rep. 506.

Was appellant, in the carriage for the express company of goods and appellee, its agent in charge thereof, performing a duty as a common carrier, or was it performing a service foreign to its duties as a common carrier, and which it could not have been compelled to perform? Railroad companies are not required by usage or common law to transport the traffic of independent express companies over its lines in the manner in which the traffic is usually carried and handled, and they need not, in the absence of a statute requiring it, furnish to such express companies equal facilities for doing an express business upon their passenger trains: *Sargent v. Boston etc. R. R. Corp.*, 115 Mass. 416; *Express Cases*, 117 U. S. 1.

In the case last cited, the railroad companies had undertaken to perform for the public the express business, before that time done over the same lines by express companies. The express companies applied for space in the express cars for their goods

and messengers, and the railroad companies refused to furnish the space or carry their messengers, and these suits ²⁷ were brought to compel the railroad to furnish the desired express facilities. The court held that it was not the duty of railroads to carry the goods and messengers of express companies, and that a railroad in such service was not performing a duty it owed to the public as a common carrier. That such right could only be acquired by an express company by contract with the railroad company. The court, by Mr. Chief Justice Waite, said:

"The reason is obvious why special contracts in reference to this business are necessary. The transportation required is of a kind which must, if possible, be had for the most part on passenger trains. It requires not only speed, but reasonable certainty as to the quantity that will be carried at any one time. As the things carried are to be kept in the personal custody of the messenger or other employé of the express company, it is important that a certain amount of car space should be specially set apart for the business, and that this should, as far as practicable, be put in the exclusive possession of the expressman in charge. As the business to be done is 'express,' it implies access to the train for the loading at the latest, and for unloading at the earliest, convenient moment. All this is entirely inconsistent with the idea of an express business on passenger trains free to all express carriers. Railroad companies are by law carriers of both persons and property. Passenger trains have from the beginning been provided for the transportation primarily of passengers and their baggage. This must be done with reasonable promptness and with reasonable comfort to the passenger. The express business on passenger trains is in a degree subordinate to the passenger business, and it is consequently the duty of a railroad company, in arranging for the express, to see that there is as little interference as ²⁸ possible with the wants of passengers. This implies a special understanding and agreement as to the amount of car space that will be afforded, and the conditions on which it is to be occupied, the particular trains that can be used, the places at which they shall stop, the price to be paid, and all the varying details of a business which is to be adjusted between two public servants, so that each can perform in the best manner its own particular duties. All this must necessarily be a matter of bargain, and it by no means follows that, because a railroad company can serve one express company in one way, it can as well serve another company in the same way, and still perform its other obligations to the public in a satisfactory man-

ner. The railroad company performs its whole duty to the public at large and to each individual when it affords the public all reasonable express accommodations. If this is done, the railroad company owes no duty to the public as to the particular agencies it shall select for that purpose.

"The exact question, then, is whether these express companies can now demand as a right what they have heretofore had only as by permission. That depends, as is conceded, on whether all railroad companies are now by law charged with the duty of carrying all express companies in the way that express carriers when taken are usually carried, just as they are with the duty of carrying all passengers and freights when offered in the way that passengers and freights are carried. The contracts which these companies once had are now out of the way, and the companies at this time possess no other rights than such as belong to any other company or person wishing to do an express business upon these roads. If they are entitled to the relief they ask, it is because it is the duty of the railroad ²⁰ companies to furnish express facilities to all alike who demand them."

In the case of *Coup v. Wabash etc. Ry. Co.*, 56 Mich. 111, 56 Am. Rep. 374, the plaintiff, the proprietor of a circus, sued the defendant railway company, as a carrier, for injuries to the proprietor's cars and equipment and to persons and animals, received by reason of a collision of two trains on defendant's road while plaintiff's circus train was being hauled over the road under a special contract exempting the railroad company from liability for such injuries, although caused by the negligence of defendant's servants.

The railway company, under the contract, furnished the engines and train crews to transport plaintiff's cars loaded with circus performers, animals, tents, etc., and the contract provided that plaintiff was to pay a certain fixed sum "for the use of said machinery, motive power, and men, and the above-mentioned privileges," the price "for the run" to each of several cities to be paid at the times named therein. It was stipulated that the defendant did not act in the premises, "as a carrier," but merely as a "hirer of said machinery, motive power, right of way, and of the men to move and work the same," etc. The contract provided that the railway company should not be responsible for injury resulting from its own negligence "in running the cars or otherwise," and provided that two advertising cars of plaintiff should be hauled in defendant's passenger trains. The circus train ran in two "sections." The forward one—for some cause not shown

—was stopped and the second section was allowed to collide with it, causing the injuries sued for. It was held that it was legal and proper in such a contract to stipulate that the railroad company should not be responsible for damages caused by its negligence. The court, by Campbell, J., said:

³⁰ "Unless this undertaking was one entered into by defendant as a common carrier, there is very little room for controversy. . . . If it was not a contract of common carriage, we need not consider how far in that character contracts of exemption from liability may extend. In our view, it was in no sense a common carrier's contract, if it involved any principle of the law of carriers at all. . . .

"It cannot be claimed on any legal principle that plaintiff could, as a matter of right, call upon defendant to move his train under such circumstances and on such conditions, and if he could not, then he could only do so on such terms as defendant saw fit to accept. . . . We think the defendant was not liable in the action, and it should have been taken from the jury and a verdict ordered of no cause of action."

A case very similar to the last was the Massachusetts case of *Robertson v. Old Colony R. R. Co.*, 156 Mass. 525; 32 Am. St. Rep. 482. In that case, the plaintiff was an employé of a circus proprietor, and sued for injuries received while he was riding over defendant's road in a car of his employer, which was being hauled under a special contract. The trial court ordered a verdict for defendant. The court, in affirming the case, said:

"Unless the defendant was under a common law or statutory obligation to carry the plaintiff in the manner he was carried at the time of the accident, it did not stand toward him in the relation of a common carrier, and the plaintiff cannot recover." The contract provided for hauling the cars of the circus, and the circus proprietor assumed all risk and agreed to "exonerate and save harmless" the defendant "from any and all claims for damages to persons and property." "This contract," the court said, "the defendant had the right to make, as it was under no obligation to draw the cars as a common carrier."

³¹ In *Chicago etc. Ry. Co. v. Wallace*, 66 Fed. Rep. 506, the United States circuit court of appeals, seventh district, held that when a railroad company, by special agreement, hauls the cars and property of a circus over its lines, it is not a common carrier, but is acting outside of its duties as such, and therefore may lawfully contract for entire exemption from liability for its negligence. The court said: "But if the company, in carrying the

plaintiffs' property under the contract and in the circumstances in which the undertaking was entered into, was not acting as a common carrier of the plaintiff's goods, but in the capacity of an ordinary private carrier for hire, then the company had the right to make the contract, and both parties are bound by its terms. That the company, in carrying the goods under the contract, was a private, and not a common or public, carrier, is the conclusion which the court has reached": See, also, *Hartford etc. Ins. Co. v. Chicago etc. Ry. Co.*, 70 Fed. Rep. 201.

In *Bates v. Old Colony R. R. Co.*, 147 Mass. 255, an express messenger was injured while riding as messenger in a baggage-car in a passenger train. The contract by which the express company's freight and messenger were carried provided that the messenger should be in the express-car, and that the railroad company would issue to him "a season ticket" at season ticket rates, being below regular full fare. The contract between the two companies further provided that the express company and its messengers should "assume all risks of accidents and injuries," and that the railroad company should be free and discharged from all claims and demands growing out of any injuries received by the messenger while on the road.

The messenger, at the request of the express company, executed and delivered to the railroad company, ^{as} in pursuance of the agreement between the two companies, an agreement reciting that by the rules of the railroad company passengers were not permitted to ride in the baggage-cars, and reciting that the messenger was the holder of a "season ticket" and was an express messenger, and as such desired to ride in the baggage-car "for the more convenient dispatch of his business" as such; the agreement then continued "that in consideration of said company allowing him to ride in the baggage-cars on its trains, the undersigned will assume all risk of accidents and injuries resulting therefrom, and will hold said company free and discharged from all claims and demands in any way growing out of any injuries received by him while so riding."

The messenger executed this agreement unwillingly, and only because he understood that he could not retain his employment as messenger unless he did execute it. The season ticket prohibited its use for express business, but had stamped upon it a statement that "the holder of this ticket, having released the company from all liability, will be permitted to ride on the baggage-car."

There was a notice posted in the baggage-car, and the rule it announced was uniformly enforced, that "No passenger will be allowed to ride in the baggage-car on any train unless he has signed a release discharging the company from all claims and demands in any way growing out of any accident or injuries while riding in such car," etc. It happened that in this case the injury would not have been received if the messenger had been in the passenger-car instead of the express-car.

The court held that the contract was binding and worked a release of such injuries as were received by ³³ reason of the plaintiff's riding in the baggage-car. The court said: "The question of the right of carriers to limit their liability for negligence in the discharge of their duty as carriers by contracts with their customers or passengers in regard to such duties, does not arise under this contract as construed in this case: See *Railroad Co. v. Lockwood*, 17 Wall. 357; *Griswold v. New York etc. R. R. Co.*, 53 Conn. 371; 55 Am. Rep. 115. It was not a contract for carriage over the road, but for the use of a particular car. The consideration of the plaintiff's agreement was not the performance of anything by the defendant which it was under any obligation to do, or which the plaintiff had any right to have done. It was a privilege granted to the plaintiff. The plaintiff was not compelled to enter into the contract in order to obtain the rights of a passenger."

In a later case in the same court, *Hosmer v. Old Colony R. R. Co.*, 156 Mass. 506, an express messenger riding in the baggage-car under a similar contract and with a similar ticket, was injured in a wreck which involved the whole train, and in which many passengers in the ordinary passenger-cars were killed and others injured. The train was derailed by defendant's negligence. The court refers to the case in 147 Massachusetts, and states that the decision was then limited to injuries occasioned by riding in the baggage-car, and did not involve the application of the release to injuries otherwise received. The court said:

"This question is now presented to us, and we are of opinion that the contract does include such injuries. The contract, after reciting that the railroad company does not allow passengers to ride in the baggage-cars of any of its trains, and that the undersigned (the ³⁴ plaintiff) 'is desirous of riding in such car for the more convenient dispatch of his business as an expressman,' proceeds as follows: 'It is understood and agreed that, in consideration of said company allowing him to ride in the baggage-cars on its trains, the undersigned will assume all risks of accident

and injuries resulting therefrom, and will hold said company free and discharged from all claims and demands in any way growing out of any injuries received by him while so riding.'

"It seems to us that the nature and fair import of the words used was, that the plaintiff should take the risk of all injuries received by him while riding in the baggage-car, however arising. The place where he was riding was one in which the defendant was under no obligation to carry him. The contract gave the plaintiff a privilege which he sought for his own convenience. That it was a valid contract cannot be questioned since the decision in *Bates v. Old Colony R. R. Co.*, 147 Mass. 255. See, also, *Quimby v. Boston etc. R. R. Co.*, 150 Mass. 365."

Under the doctrine declared in *Express Cases*, 117 U. S. 1, the property was being carried by appellant, not as a common carrier in the performance of a public duty, but being carried, with a messenger in charge, as a private carrier, the right to have it and him carried having first been secured to the express company by private contract, the only way known to the law by which the right, either as to the goods or appellee as express messenger in charge, could be acquired.

Appellee, when he went upon the appellant's train and took charge of the express packages in the baggage-car, did not go as a passenger who merely desired to be carried on the train from one point to another. Carriage was not the object of his going upon the train; that was merely incidental. His purpose was not to be upon the train, in the cars provided for passengers, but that he might handle and care for the property of his employer thereon, in the space set apart in the baggage-car for that purpose. Under the authorities cited, it was not the duty of appellant, as a common carrier, to carry for the express company the goods or messenger in charge of them. The contract between appellant and the express company gave it and its messenger rights which appellant as a common carrier could not have been compelled to grant: *Express Cases*, 117 U. S. 1; *Bates v. Old Colony R. R. Co.*, 147 Mass. 255; *Hosmer v. Old Colony R. R. Co.*, 156 Mass. 506.

The contracts set out in the third paragraph of answer were not in regard to any duties appellant was required to perform as a common carrier, nor did such contracts attempt to limit the liability of appellant for negligence in the discharge of its duties as a common carrier; the same are, therefore, binding upon all the parties thereto. Appellee, by his contract, assumed all the dangers of the trip, however occasioned, and undertook and

agreed to release and discharge appellant from all liability if he in any way should be injured in his person by the negligence of appellant, and authorized and empowered the express company to enter into a contract exempting appellant from all liability for injuries to appellee. The contract of the express company with appellant was, therefore, binding upon appellee the same as if he had executed it in person. It follows that the court erred in sustaining the demurrer to the third paragraph of answer.

It is not alleged in the second paragraph of answer that the express company or appellee in any contract with appellant ever assumed any risks or damages of any kind, or that the appellant had notice or knowledge of the terms of the agreement between appellee³⁶ and the express company. The mere fact that appellee had entered into the contract alleged with the express company would not entitle appellant to the benefit thereof. The court did not err in sustaining the demurrer to the second paragraph of answer.

Judgment reversed, with instructions to overrule the demurrer to the third paragraph of answer, and for further proceedings not inconsistent with this opinion.

CARRIERS—EXTENT TO WHICH MAY LIMIT LIABILITY BY EXPRESS CONTRACT—By the common law, a carrier may, by special contract, limit its liability as an insurer, but it cannot restrict it so as to excuse itself from loss or damages resulting from the negligence of its servants or agents: *Hudson v. Northern Pac. Ry. Co.*, 92 Iowa, 231; 54 Am. St. Rep. 550, and note. See, also, note to *Duntley v. Boston etc. R. R.*, 49 Am. St. Rep. 613.

CARRIERS—PASSENGERS—WHO ARE—EXPRESS MESSENGERS.—A carrier agreed with an express company to carry its "money safes, contents, and messengers, assuming no liability whatever in the matter." It was held that this would not prevent a messenger riding under such an agreement from recovering damages for injuries caused by carrier's negligence: *Blair v. Erie Ry. Co.*, 66 N. Y. 313; 23 Am. Rep. 55. As to who are passengers, see *Chicago etc. R. R. Co. v. Field*, 7 Ind. App. 172; 52 Am. St. Rep. 444, and note; *Bricker v. Philadelphia etc. R. R. Co.*, 132 Pa. St. 1; 19 Am. St. Rep. 585, and note.

LAPORTE v. GAMEWELL FIRE ALARM TELEGRAPH COMPANY.

[146 INDIANA, 466.]

CONSTITUTIONAL LAW—CONSTRUCTION.—If a clause is taken from the constitution or statute of another state, it is deemed to have the meaning given by the courts of that state.

MUNICIPAL CORPORATIONS—INDEBTEDNESS.—If a municipal corporation contracts for a usual or necessary thing, and agrees to pay for it annually or monthly, as furnished, the contract does not create an indebtedness for the aggregate sum of all the installments.

MUNICIPAL CORPORATIONS—INDEBTEDNESS—CONSTITUTIONAL LIMIT.—If a city has money to pay its indebtedness when it comes into existence without exceeding the constitutional limit, there is no indebtedness and no violation of the constitution; but, if the indebtedness of the city already equals or exceeds the constitutional limit, and the current revenues are not sufficient to pay such indebtedness when it comes into existence, together with all its other expenses, an indebtedness is thereby created and the constitution violated.

MUNICIPAL CORPORATIONS—INDEBTEDNESS—CONSTITUTIONAL LIMIT.—If the current revenues of a city are sufficient to fully pay its current expenses, necessarily incurred to sustain corporate life, no indebtedness is created, but a debt cannot be incurred beyond the constitutional limit, even for current expenses, no matter how urgent.

MUNICIPAL CORPORATIONS—INDEBTEDNESS—CONSTITUTIONAL LIMIT.—Whenever a city, whose indebtedness exceeds the constitutional limit, does not have money arising from current revenues to meet its debts, of whatever character, as they come into existence, or, having the money, does not pay them, the city is indebted and the constitution violated.

MUNICIPAL CORPORATIONS—INDEBTEDNESS.—Municipal obligations payable out of a particular fund, and for which the fund only, and not the municipality, is liable, are not within constitutional limitation on the power of a city to contract debts.

MUNICIPAL CORPORATIONS—LIMITATIONS ON INDEBTEDNESS.—Under constitutional limitations on the power of a city to incur indebtedness, the municipality may, after it has reached its limit, anticipate the collection of the revenue appropriated to its use by drawing warrants against taxes levied, but not collected, thus substantially appropriating and assigning the amount drawn to the holder of the warrant; but, in such case, the tax must not only have been levied, but the warrant must be drawn, payable out of the particular fund, and be such in legal effect as to discharge the municipality from all liability.

MUNICIPAL CORPORATIONS—INDEBTEDNESS IN EXCESS OF CONSTITUTIONAL LIMITATION.—A contract made by a city for a necessary or annual expense, as a fire alarm system, at a time when such city is indebted beyond the limit fixed by the state constitution, and when it has no money in its treasury to meet such contract at that time, nor when it is completed or accepted is void, although the city has sufficient money to pay at the time fixed by the contract for such payment.

W. B. Biddle and J. H. Bradley, for the appellant.

A. Anderson, for the appellee.

⁴⁰⁷ MONKS, J. This action was brought by appellee against appellant, to recover the contract price of a fire alarm system furnished by appellee.

The court, at the request of the parties, made a special finding of facts and stated as a conclusion of law thereon, that appellee was entitled to recover the contract price. To this conclusion of law appellant excepted. The assignment of errors calls in question the conclusion of law.

It appears, from the special finding, that on August 5, 1890, appellee entered into a contract with appellant to furnish and put in complete working order appellee's system of fire alarm, for the sum of \$3,500, to be paid May 1, 1891. The contract provided that when said system was completed appellant should accept the same and deliver to appellee a certificate to that effect. The work was completed and accepted by appellant December 18, 1890. At the time of entering into the contract, and until May 1, 1891, appellant was indebted, not including appellee's claim, over \$5,000, more than two per cent on the assessed value of its taxable property. At the date of said contract \$2,639.90 was on hand in the city treasury. When the work was completed and accepted there was on hand in the general fund \$359. On May 1, 1891, there were \$10,328.80 in the city treasury belonging to the general fund collected from the duplicate of 1890. On June 30, 1890, the common council of appellant, by ⁴⁰⁸ resolution duly passed, ordered that a tax of \$1.05 on each hundred dollars of valuation of taxable property be levied, seventy-four cents for general purposes and thirty-one cents for the purpose of paying \$5,000 of the city debt and the interest on the city debt. That the amount of said levy was \$31,285. No specific levy was ever made for the purpose of meeting any indebtedness to appellee.

On June 22, 1891, the common council passed a resolution, declaring "that \$3,532.68 be set aside out of the general fund for the purpose of paying the order drawn in favor of the Gamewell Fire Alarm Telegraph Company, which was ordered drawn May 25, 1891, by the common council, and which the mayor refused to sign."

Appellant earnestly insists that by the contract sued upon appellant became indebted to appellee, and that the same was void under the provisions of article 13 of the constitution, for

the reason that appellant was already indebted in excess of the amount allowed by said article.

Article 13 of the constitution, adopted in 1881, is as follows: "No political or municipal corporation in this state shall ever become indebted, in any manner or for any purpose, to an amount, in the aggregate exceeding two per centum on the value of the taxable property within such corporation, to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness; and all bonds or obligations, in excess of such amount, given by such corporation, shall be void; provided, that in time of war, foreign invasion, or other great public calamity, on petition of a majority of the property owners, in number and in value, within the limits of such corporation, the public authorities, in their discretion, may incur obligations necessary for the public protection ⁴⁶⁹ and defense to such an amount as may be requested in such petition."

This clause in our constitution is, in legal effect, the same as that of Iowa, and was no doubt taken from the constitution of that state. It is a familiar rule that where a clause is taken from the constitution or statute of another state it will be deemed to have the meaning given it by the courts of that state. Under this provision every indebtedness incurred "in any manner or for any purpose" is within the prohibition: *Council Bluffs v. Stewart*, 51 Iowa, 385; *Scott v. Davenport*, 34 Iowa, 208; *Grant v. Davenport*, 36 Iowa, 396, 401; *French v. Burlington*, 42 Iowa, 614; *Anderson v. Orient Fire Ins. Co.*, 88 Iowa, 579; *Brown v. Corry*, 175 Pa. St. 528; *Lake County v. Rollins*, 130 U. S. 662; *Doon Tp. v. Cummins*, 142 U. S. 366; *Litchfield v. Ballou*, 114 U. S. 190; note to *Beard v. Hopkinsville*, 23 L. R. A. 402-408; note to same case, 44 Am. St. Rep. 229-243.

The controlling question in this case is, Do the facts found show an indebtedness of appellant within the inhibition imposed by the foregoing article of the constitution?

A debt in its general sense is a specific sum of money which is due or owing from one person to another, and denotes not only an obligation of the debtor to pay, but the right of the creditor to receive and enforce payment: *State v. Hawes*, 112 Ind. 323; *Valparaiso v. Gardner*, 97 Ind. 1; 49 Am. Rep. 416; *Crowder v. Sullivan*, 128 Ind. 486.

It is the rule in this state that when a municipal corporation contracts for a usual and necessary thing, such as water or light, and agrees to pay for it annually ⁴⁷⁰ or monthly, as furnished, the contract does not create an indebtedness for the aggregate sum

of all the installments, since the debt for each year or month does not come into existence until it is earned. The earning of each year's, or month's compensation is essential to the existence of a debt: *Crowder v. Sullivan*, 128 Ind. 486, and authorities cited; *Valparaiso v. Gardner*, 97 Ind. 1; 49 Am. Rep. 416, and cases cited; *Foland v. Frankton*, 142 Ind. 546, and authorities cited; *Seward v. Liberty*, 142 Ind. 551, 554; 1 *Dillon on Municipal Corporations*, 4th ed., sec. 136 a; *Wade v. Oakmont Borough*, 165 Pa. St. 479; *Brown v. Corry*, 175 Pa. St. 528.

If the city can pay this indebtedness when it comes into existence without exceeding the constitutional limit, there is no indebtedness, and therefore no violation of the constitution. But if the indebtedness of the city already equals or exceeds the constitutional limit, and the current revenues are not sufficient to pay such indebtedness when it comes into existence, including other expenses for which the city is liable, an indebtedness is thereby created and there is a violation of the constitution: *Valparaiso v. Gardner*, 97 Ind. 1; 49 Am. Rep. 416; *Dillon on Municipal Corporations*, secs. 136, 136 a; *Appeal of Erie*, 91 Pa. St. 399.

It is also the law that items of expense essential to the maintenance of corporate existence, such as light, water, labor, and the like constitute current expenses payable out of current revenues: *Foland v. Frankton*, 142 Ind. 550. When the current revenues are sufficient to fully pay the current expenses necessarily incurred to sustain corporate life, no indebtedness is incurred. But a debt cannot be made beyond the constitutional limit, even for the current expenses mentioned, no matter how urgent: *Sackett v. 471 New Albany*, 88 Ind. 473; 45 Am. Rep. 467; *Valparaiso v. Gardner*, 97 Ind. 1; 49 Am. Rep. 416.

It is clear, therefore, that whenever a city whose indebtedness exceeds the constitutional limit, does not have the money on hand arising from current revenues to meet its debts of whatever character as they come into existence, whether for light, water, labor, or any other expense, the city has become indebted and the constitution is violated.

It is not sufficient, however, merely to have on hand enough money to pay each indebtedness as it comes into existence, but the same must be paid as it comes into existence, or there must be enough money on hand to pay all of such indebtedness outstanding, or there will be an indebtedness created and the constitution be thereby violated.

If to avoid the constitutional inhibition it is only necessary to have on hand sufficient money to pay an indebtedness when it comes into existence, without paying or keeping on hand enough money to pay it, there would be no restraint upon the power of a municipality to become indebted.

Obligations payable out of a particular fund, and for which the fund only and not the municipality is liable, are not within the inhibition: *Quill v. Indianapolis*, 124 Ind. 292; *Strieb v. Cox*, 111 Ind. 299; *Board etc. v. Hill*, 115 Ind. 316; *New Albany v. McCulloch*, 127 Ind. 500, 505; *Hitchcock v. Galveston*, 96 U. S. 341; *Galveston v. Heard*, 54 Tex. 420; *Davis v. Des Moines*, 71 Iowa, 500; *Baker v. Seattle*, 2 Wash. 576; *Austin v. Seattle*, 2 Wash. 667.

The same rule applies to agreements to accept certificates of assessments in full satisfaction: *Davis v. Des Moines*, 71 Iowa, 500. But anything that renders ⁴⁷² the city liable brings the indebtedness within the restriction: *Fowler v. Superior*, 85 Wis. 411.

It is held in some states, under constitutional provisions substantially the same as ours, that a municipality which has reached its limit may anticipate the collection of the revenue appropriated to its use by drawing warrants against taxes levied but not collected, thus substantially appropriating and assigning the amount drawn to the holder of the warrant: *French v. Burlington*, 42 Iowa, 614; *Law v. People*, 87 Ill. 385; *Springfield v. Edwards*, 84 Ill. 626; *East St. Louis v. Flannigan*, 26 Ill. App. 449; *Kopikus v. State Capitol Commrs.*, 16 Cal. 248.

But, in order to escape the inhibition of the constitution, the tax must not only have been levied, but the warrant must be drawn payable out of the particular fund, and be such in legal effect as to discharge the municipality from all liability: *Springfield v. Edwards*, 84 Ill. 626; *Law v. People*, 87 Ill. 385; *Fuller v. Chicago*, 89 Ill. 282; *People v. May*, 9 Colo. 404.

In *Valparaiso v. Gardner*, 97 Ind. 13, 49 Am. Rep. 416, this court said: "If a bond, note, or other obligation is executed, then, doubtless, a debt is created, for such things constitute evidences of indebtedness. . . . So, if the consideration of the contract is received at once, instead of being yielded in the future or at intervals, then it might be said that there was a debt; but where there is nothing owing until after the thing contracted for is done or furnished, and that thing is a part of the necessary yearly expenses of the municipality, there will be no debt, if, when the thing is done or furnished there will be money in the

treasury, yielded by current revenues, sufficient to fully pay the claim without encroaching upon other funds."

Conceding, without deciding, that a fire alarm system ⁴⁷³ is a necessary or ordinary annual expense of a municipality and essential to its existence, yet appellee's claim is within the inhibition of the constitution. In this case it is not material whether the indebtedness came into existence on December 18, 1890, when appellee completed the work and the same was accepted by appellant, or at the date of the contract, August 5, 1890. It is clear that the indebtedness came into existence December 18th, when the work was completed and accepted, if not before. There was not sufficient cash in the city treasury to pay said indebtedness at that time, and the constitutional provision was violated. But it is urged that the debt was not payable until May 1, 1891, and that there was sufficient cash in the treasury to pay the same at that time. The rule is, that the cash must be in the treasury to pay the same when the debt comes into existence, not when it becomes due: *Valparaiso v. Gardner*, 97 Ind. 1; 49 Am. Rep. 416. Otherwise, the city could issue bonds for borrowed money or other existing indebtedness, or become so indebted in other ways far in excess of the constitutional limit, and by making the same payable in annual installments, and each year levying and collecting sufficient taxes to pay the same, avoid the constitutional inhibition.

It is claimed by appellee that under the law, as declared in *Brashear v. Madison*, 142 Ind. 685, appellant is liable, and the conclusion of law therefore correct. The case cited was brought to enjoin the city of Madison from entering into a contract with the appellee in the case for the erection and location of a fire alarm system in said city, for which the city was to pay when completed \$5,000; upon the ground that the city was indebted in excess of the constitutional limit. In that case this court held that it was shown by the allegations of the complaint that it was ⁴⁷⁴ not proposed to create an indebtedness, but simply to make a cash purchase. In overruling the petition for a rehearing this court said: "The theory of the original opinion is, that to sustain the suit, the appellants were required to show that the maximum debt limit, as prescribed by the constitution, had been reached, and that the city was about to create an additional debt, and that they had failed to show this. This failure, it was held, was due to the fact that it was not proposed to create a debt, but simply to make a cash purchase, the city having in its treasury the funds with which to pay therefor."

Counsel for appellee cites *Powell v. Madison*, 107 Ind. 106. That was a suit to enjoin the officers of that city from issuing bonds to a certain amount, or any part of them, or in any manner borrowing money or creating a debt under and by virtue of an ordinance to fund the indebtedness of the city, set out in the complaint, upon the ground that the city was already indebted in excess of the constitutional limit. The city of Madison answered, admitting the indebtedness as stated in the complaint, but averred that the city did not intend to make use of, or to appropriate any of such bonds or any of the proceeds for which they might be sold, for the purpose of paying or extinguishing any part of the indebtedness of the city contracted since March 14, 1881, when section 13 of the constitution took effect; but solely and only to exchange such bonds for, or use their proceeds in payment of bonds of such city outstanding for debts incurred before that date. This answer was held to be sufficient by this court upon the ground that the new bonds, as provided for in the ordinance, would represent the debt that the bonds issued prior to March 14, 1881, represented, and that thus no new debt would be created. If such new bonds were exchanged for the old ones, ⁴⁷⁵ one would only be a substitute for the other and be an extinguishment thereof, and the aggregate outstanding indebtedness would not be increased. Neither if the new bonds were sold for cash and the old bonds paid therewith would the indebtedness be increased. The presumption is, that public officers will perform their duties honestly, and upon this presumption the injunction in that cause was refused. But if the proceeds of the sale of the new bonds were misapplied by the officers and the old bonds not paid, the indebtedness would be increased.

It was not held in *Powell v. Madison*, 107 Ind. 106, that the new bonds would be valid under such circumstances. It was held by the supreme court of the United States, in *Doon Tp. v. Cummins*, 142 U. S. 366, under the provisions of the constitution of Iowa, that when the bonds had been sold to pay off other bonds which were equal to the constitutional limit, and the money received for the new bonds was misapplied and the old bonds not paid, that the new bonds were invalid and not collectible.

To the same effect is *Anderson v. Orient Fire Ins. Co.*, 88 Iowa, 579. This question, however, is not involved in this case, and it is not necessary to determine whether or not the same rule prevails in this state.

It is the duty of persons dealing with public officers to take notice of their official and fiduciary character, and that they can only bind the public corporation they represent in the manner and to the extent authorized by law: *Bloomington School Tp. v. National School Furnishing Co.*, 107 Ind. 43, and cases cited; *Julian v. State*, 122 Ind. 68; *Honey Creek School Tp. v. Barnes*, 119 Ind. 213; *Union School Tp. v. First Nat. Bank*, 103 Ind. 464.

Appellee was required to take notice of the fact that appellant was indebted beyond the constitutional ⁴⁷⁶ limit, and that the city, therefore, had no power to become indebted.

Appellant had no power, under the facts stated in the special finding, to become indebted to appellee, and the common council had no power to ratify or validate the same by resolution or otherwise: *Doon Tp. v. Cummins*, 142 U. S. 366; *Marsh v. Fulton County*, 10 Wall. 676; *Loan Assn. v. Topeka*, 20 Wall. 655; *Daviess County v. Dickinson*, 117 U. S. 657; *Norton v. Shelby County*, 118 U. S. 425; *Kane v. Independent Dist.*, 82 Iowa, 5; *Kelley v. Milan*, 127 U. S. 139.

The resolution of the common council, adopted June 22, 1891, was therefore ineffective and gave no validity to appellee's claim.

It follows that the court erred in its conclusions of law.

Judgment reversed, with instructions to the court below to restate its conclusions of law and render judgment in accordance with this opinion.

STATUTES—CONSTRUCTION—ADOPTION FROM ANOTHER STATE.—The decisions of a court of last resort in one state, sustaining the validity of a statute in its entirety are entitled to great respect by the courts of another state, when passing upon the validity of an entirely similar statute enacted in the latter state, and are generally held to be controlling when the law has been enacted after such decisions were made: *Rouse v. Donovan*, 104 Mich. 234; 53 Am. St. Rep. 457, and note; *State v. Chandler*, 132 Mo. 156; 53 Am. St. Rep. 483.

MUNICIPAL CORPORATIONS—INDEBTEDNESS—PROHIBITION AGAINST CREATING.—Under a constitutional provision against the incurring of any indebtedness by a county which cannot be paid out of the funds on hand and the levy of the current fiscal year, orders issued by a county to a contractor in payment for the construction of a courthouse, payable out of funds to be raised from tax levies to be made in a subsequent year are void: *Merchants' Nat. Bank v. Spates*, 41 W. Va. 27; 56 Am. St. Rep. 828, and note. See the monographic note to *Beard v. Hopkinsville*, 44 Am. St. Rep. 229-243, on what is within the meaning of prohibitions against municipal indebtedness. Also, see *McBean v. Fresno*, 112 Cal. 159; 53 Am. St. Rep. 191; *Kilchli v. Minnesota etc. Electric Co.*, 58 Minn. 418; 49 Am. St. Rep. 523, and note.

JOHNSON v. SCHLOESSER.

[146 INDIANA, 501.]

JUDGMENTS—LIEN OF—FAILURE TO DOCKET.—The lien of a judgment on land is not lost by the failure of the clerk of a court to enter the judgment on the judgment docket, although such real estate has passed into the hands of a bona fide purchaser without notice of such judgment.

JUDGMENTS—FAILURE TO DOCKET—REMEDY OF BONA FIDE PURCHASER.—Under a statute making a clerk of a court liable personally and upon his official bond to any person for the amount of the damages sustained by his neglect to enter a judgment on the judgment docket, a bona fide purchaser of land against which a judgment lien exists without his knowledge at the time of the purchase, has a right of action against such clerk and his sureties to recover such damages as he has sustained by reason of the neglect of the clerk to enter such judgment on the judgment docket.

A. Stockinger and J. B. Rebuck, for the appellant.

M. R. Connelley, for the appellee.

⁵¹⁰ **McCABE, J.** The appellee sued the appellant, Johnson, and Henry Bushing, sheriff of Ripley county, in a complaint of two paragraphs, seeking to enjoin the sale on execution of certain land on a judgment in favor of appellant, Hannah Johnson, and against one John W. Johnson.

The circuit court overruled a demurrer for want of sufficient facts to each paragraph of the complaint and sustained a like demurrer to the second paragraph of the separate answer of Hannah Johnson. A trial of the issues resulted in a finding and judgment in favor of the plaintiff and against the defendant, perpetually enjoining the sale of said land on said judgment and execution.

The errors assigned call in question the rulings above mentioned, and the action of the circuit court in overruling the defendant's motion for a new trial. The last error assigned is waived by the failure of appellants' counsel to discuss the same in their brief. The question of law involved arises on the facts stated in the complaint, as well as those stated in the answer.

It appears from the complaint that on August 8, 1887, one John W. Johnson and Clemency B. Johnson conveyed a certain town lot, particularly described in the town of Batesville, in Ripley county, Indiana, to James W. White, and on April 9, 1892, said James W. White and wife conveyed the same for a valuable consideration to the plaintiff, appellee, George F. Schloesser; that on September 13, 1886, in a cause pending in the Ripley

Circuit Court for divorce, wherein said Hannah Johnson was plaintiff, and said John W. Johnson was defendant, said court rendered judgment, awarding her a divorce and for fifty-six dollars alimony, to be paid on September 14, 1886, and the further sum of fifty dollars each year during the natural life of Clemency B. Johnson; that said John W. Johnson ⁵¹¹ paid the fifty-six dollars as ordered on September 14, 1886, but that said payment was never entered on the order book, judgment docket, or elsewhere; that the only record or entry of said judgment ever placed in the judgment docket of said court by the clerk thereof, or by any other person, is as follows: "Judgment docket F, page 200. Hannah Johnson v. John W. Johnson, order book FF, page 462; judgment against the defendant for costs, date of rendition September 13, 1886."

That the fee docket of said court in which the fees and costs accrued in said action were entered, shows that said costs were duly paid by said plaintiff, and on the margin of said fee book, on the same page whereon is entered said fees and costs, the following entry is made, to wit: "It was the agreement between the plaintiff and the defendant that the plaintiff is to pay this cost, and that when it is paid by her it is to be a satisfaction of this judgment as against the defendant. (Signed) Charles H. Willson, attorney for plaintiff."

That at the time plaintiff purchased said real estate he had no knowledge or notice of any kind that the defendant, Hannah Johnson, had or claimed any judgment against said John W. Johnson, or any other person; that the fee book showed, at the time the abstract hereinafter mentioned was made, at the time plaintiff purchased said premises, that the costs aforesaid were paid, and showed the entry of satisfaction of said judgment, signed by Charles H. Willson, as aforesaid; that before purchasing said premises, to wit: on March 23, 1892, plaintiff employed the recorder of Ripley county to make him an abstract of title for said real estate; that said abstract when so made did not mention, show, or allude to any judgment against said John W. Johnson in favor of any person; that ⁵¹² said recorder, on examining the judgment docket of said court, in preparing said abstract, found the only entry on record of said judgment to be as set forth above; that believing and relying on said abstract, and having no knowledge of the judgment mentioned, the plaintiff purchased said real estate, as aforesaid; that on the fifteenth day of June, 1894, said defendant, Hannah Johnson, caused an execution to issue out of the clerk's office of the Ripley Circuit Court on said judg-

ment for the sum of four hundred and six dollars, with interest and costs, directed to the sheriff of said Ripley county, which came to the hands of the defendant sheriff of said Ripley county, and was by him, on August 24, 1894, levied on said real estate; that said defendants are threatening to sell said real estate by virtue of said execution and judgment, unless restrained, and thereby cast a cloud on plaintiff's title to said real estate. Prayer for a temporary restraining order and on the final hearing, a perpetual injunction.

Two reasons are urged by the appellant why the complaint is not good, namely: 1. That the lien of the judgment is not lost as against anybody by the failure of the clerk to enter it on the judgment docket; and 2. If it would be so lost as against a subsequent bona fide purchaser, that there was enough entered on the judgment docket in this case to put an ordinarily prudent man on inquiry which must lead to full knowledge of the judgment. If the question of law raised by the first reason urged should be decided in favor of appellant the second would be wholly unimportant. The appellee contends that while the judgment is a lien on all the real estate of the judgment defendant in the county as against him, without being entered on the judgment docket, yet that it is not a lien as against subsequent good faith purchasers for value of any of such real estate, unless such judgment is entered ⁵¹³ on the judgment docket; and further, that the entry here was not such as to put him on inquiry.

Several sections of the code embraced in article 24, title "judgment," exert a controlling influence in the proper determination of the question. Section 588 of Burns' Revised Statutes of 1894 (Rev. Stats. 1881, sec. 579), provides that: "The judgment must be entered in the order book, and specify clearly the relief granted or other determination of the action." Section 591 of Burns' Revised Statutes of 1894 (Rev. Stats. 1881, sec. 582), provides that: "The clerk of every court of record shall keep a docket, in which he shall enter, within thirty days after each term of the court, in alphabetical order, a statement of each judgment rendered at such term, containing: 1. The names, at length, of all the parties; 2. The amount of the judgment and costs, and the date of its rendition; 3. If the judgment be against several persons, the statement shall be repeated under the names of each defendant, in alphabetical order." Section 593 of Burns' Revised Statutes of 1894 (Rev. Stats. 1881, sec. 584), provides that: "Such docket shall be a record, and open

during the usual hours of transacting business to the examination of any person desiring it." Section 594 of Burns' Revised Statutes of 1894 (Rev. Stats. 1881, sec. 585), provides that: "Every clerk neglecting to enter any judgment or recognizance, as herein required, shall be liable to any person injured for the amount of damages sustained by such neglect, to be recovered in an action against the clerk alone, or upon his official bond against him and his sureties." Section 617 of Burns' Revised Statutes of 1894 (Rev. Stats. 1881, sec. 608), provides that: "All final judgments in the supreme and circuit courts for the recovery of money or costs shall be a lien upon real estate and chattels real, liable to execution in the county where judgment is rendered, for the space of ten years after the ⁵¹⁴ rendition thereof, and no longer, exclusive of the time during which the party may be restrained from proceeding thereon by any appeal or injunction, or by the death of the defendant, or by agreement of the parties entered of record."

It is conceded on both sides, and we think correctly, that in solving the question here involved, the several sections of the code quoted above must be construed together. But the appellant contends that they must be so construed as to hold that the action for damages against the clerk for failure to docket a judgment is intended to be given to the good faith purchaser, and not to the holder and owner of the judgment; and, on the contrary, the appellee contends that such right of action was intended to be given to the judgment creditor, and not to the bona fide purchaser of the real estate for value.

Appellee's learned counsel, in support of the latter position, say: "Now, we hold that while the judgment docket is not necessary to constitute the judgment lien, it is necessary to constitute sufficient notice thereof to third parties, and that a subsequent purchaser for a valuable consideration is only bound to look to the judgment docket for judgment liens, and, . . . in the absence of actual notice, he takes the land discharged from the lien, and the remedy of the judgment plaintiff, if there is no other property, is against the clerk, under section 585 of the Revised Statutes of 1881."

In support of this contention appellee's counsel cite *Berry v. Reed*, 73 Ind. 235. While the opinion in that case contains some remarks by the learned judge who delivered it, favorable to appellee's contention, yet such remarks were clearly obiter dictum. The questions actually involved, and to a determination of which the opinion strictly confines the decision, do not

support the appellee's contention. ⁵¹⁵ The judgment lien there involved was sought to be created and established by the filing of a transcript of a judgment rendered in the common pleas court of another county than that in which the transcript was filed. It was there said that: "The plain intent of the lawmakers was that the filing and recording provided for in section 528 should be substantially contemporaneous acts, and where, by the next section, it was enacted that the judgment should be a lien from the time of filing, it was meant as against subsequent purchasers without actual notice, that a judgment filed, recorded, and docketed as required in the previous section, should be a lien. . . . But deciding nothing as to the lien of judgments in the counties where rendered, and where, in every case, there is a record, in some form, which is accessible to every purchaser, and confining our decision to the case before us, we hold that the transcript of a judgment filed in another county, under the provisions of sections 528 and 529 of the code, *supra*, does not create a lien against subsequent purchasers in good faith, without notice, unless recorded and entered in the judgment docket." This decision proceeds upon the idea that the entry in the judgment docket is as essential to the creation of the lien as the recording of the transcript in the order book. The two acts are said to be intended by the lawmakers to be contemporaneous.

This case falls far short of supporting appellee's contention. It will be observed that the sections of the statute authorizing the creation of a lien in one county by filing a transcript of a judgment from another county, and causing the same to be recorded and entered in the judgment docket, do not provide where such transcript is to be recorded: Burns' Rev. Stats. 1894, secs. 619, 620 (Rev. Stats. 1881, secs. 610, 611). But they do provide where the judgment is to be entered. The ⁵¹⁶ practice is to record the transcript in the order book. The entry is required to be made in the judgment docket. The word "docket" is usually applied to the book or paper in which is entered a brief abstract of all proceedings in court: 5 Am. & Eng. Ency. of Law, 849. So that it would seem that there is much reason for holding that the entry in the judgment docket is as much a part of the essential requirement to make a transcript of a judgment from another county a lien as the act of recording the transcript thereof in the order book. But the case of a judgment rendered in the same county presents a different question, as the case cited clearly recognizes.

Appellee also cites and relies on *Bell v. Davis*, 75 Ind. 314. But that was the same kind of a case, involving the validity of the supposed lien of a judgment from another county by a transcript. Referring to *Berry v. Reed*, 73 Ind. 235, the court, in the former case, says: "It is there expressly held, that, in order that the judgment shall constitute a lien, the clerk of the county to which the transcript is transmitted must enter and record it in the judgment docket of the county. . . . Judgment liens are created by statute, and the requirements of the statute giving a lien must be complied with, or none exists. In this case no lien attached until the transcript was filed, entered, and docketed as the statute requires."

It will be observed that both of these cases hold that the filing and recording of a transcript of a judgment from another county, by the clerk of the county to which it was transmitted, creates no lien at all against anybody unless such judgment is also entered in the judgment docket of the latter court. It is not there held, as counsel suppose, that the lien only fails as to bona fide purchasers for value without actual ⁵¹⁷ notice, but exists as between the parties and as to those having notice.

Another case cited by appellee in support of his contention is, *State v. Record*, 80 Ind. 348. That was a suit brought against the clerk by the purchaser of the land involved in *Bell v. Davis*, 73 Ind. 235, for failure to enter the judgment in the judgment docket. It was simply adjudged, in accordance with the two previous cases, that the plaintiff could not recover because the clerk's failure to so enter such judgment did not injure the purchaser, by reason of the fact that no lien attached to the land he purchased by virtue of the recording of the transcript without also entering the judgment in the judgment docket. In other words, that he received a good title by virtue of his purchase. But it remains to be determined what is the effect of a failure to enter a judgment rendered in the same county in the judgment docket. That question has never yet been decided by this court.

The judgment in the county where rendered is required by section 588, *supra*, to be entered in the order book. Section 617, above cited, makes all such judgments liens upon the real estate of the judgment defendant in the county for the space of ten years after the rendition thereof. There is no exception or qualification to this provision, unless it be in the sections above quoted relative to entering the same in the judgment docket. It is

very clear, from those sections, that the entry in the judgment docket is no part of the judgment, because it is not required to be entered until the thirty days next ensuing after the term of court at which the judgment is rendered. It is also apparent therefrom that such judgment docket is designed as a sort of index to, or convenient means of, ascertaining the judgments rendered against any ⁵¹⁸ party in such county whether such party owns real estate in the county or not.

It was said in *Berry v. Reed*, 73 Ind. 235, that: "Under these provisions, the purchaser of real estate, for thirty days after the close of a term of court, is bound to look to the order books for the judgments rendered at such term; and such may be the rule, even after the expiration of the thirty days." This statement of the law is undoubtedly correct, because the statute makes the judgment a lien on the defendant's real estate in the county for ten years next after its rendition. And as the section providing for the entry thereof in the judgment docket allows thirty days after the term to make such entry, it necessarily follows that that provision does not take away the lien created by the other section, at least during such thirty days for failure to enter the judgment in the judgment docket. If, after the expiration of such thirty days, the judgment is not entered in the judgment docket, and if the lien ceases on account thereof as against a bona fide purchaser or anybody else, the question arises, by virtue of what law, or what provision in the statute, does it so cease? It is a well-established rule of construction of statutes that the entire statute must be construed together, and that effect must be given to every part of a statute if it can be done without manifestly violating the intention of the legislature: *Cleveland etc. Ry. Co. v. Backus*, 133 Ind. 513; *Potter's Dwarries on Statutes*, 189.

It is contended by the appellee that the section giving the right of action against the clerk for failure to enter the judgment in the judgment docket is to be construed as giving such right to the judgment creditor. If that be correct, then it would necessarily follow that the intent was that the judgment creditor should lose the lien he had acquired by his diligence, ⁵¹⁹ through the negligence of the clerk a month after the close of the term. But such a construction of the different sections necessarily renders a part of the statute of no effect. Section 617 makes the judgment a lien without qualification for ten years next after its rendition, against the world. The construction

328 McCABE, J. Appellant's relators, Maxey and O'Keefe, applied to the circuit court for a writ of mandate against the appellee as mayor of the city of Plymouth, Indiana, to compel him to recognize each of them as members of the city council of said city, and to permit them to exercise the duties of such councilmen, they alleging that they had been legally appointed and qualified as members of said council from the alleged fourth ward of said city, which ward they allege had been duly and lawfully created by a certain alleged ordinance enacted by the common council of said city, August 27, 1894.

Appellee resisted the action, basing his defense upon two propositions, namely:

1. That the common council was not authorized by law to adopt the ordinance by which said additional or fourth ward was created, of its own motion, as was done in this case, and without a previous petition being filed therefor by resident citizens of the ward or wards affected, and that the ordinance being invalid for this reason there was no fourth ward and no vacancies in the office of councilman to be filled when relators were appointed, and hence they were not members of the common council or entitled to be recognized as such.

2. That if the council had authority of law to enact the ordinance creating the additional or fourth ward without petition and of its own motion, that the ordinance was invalid and of no force or effect for the reason that it was passed and adopted contrary to, and in violation of, the rules of procedure that had long been in force in said council.

529 The issues formed were tried by a jury, the trial court directing the jury to find for the plaintiff, which they did, and a peremptory writ of mandate was awarded against the mayor. From that judgment he appealed to this court and the judgment was reversed: *Swindell v. State*, 143 Ind. 153.

This court, on that appeal, decided the first proposition above mentioned in favor of the action of the common council and against the then appellant, the present appellee. And the second proposition or contention was decided in favor of the then appellant, the present appellee. The cause was reversed both for the error of striking out the second paragraph of the answer or return, setting up the defense involved in said second proposition, and for the error of holding, as appeared from the evidence, that the rule had been repealed in violation of which the ordinance establishing the fourth ward had been passed. In the order of reversal leave was given to amend the second paragraph

of answer or return. On the return of the cause to the lower court said answer was amended only in immaterial respects.

The substance of the second paragraph of answer as amended is, that on August 27, 1894, the time of the regular meeting of the common council of the city of Plymouth, when said pretended ordinance was passed creating the fourth ward, and for a long time prior thereto, said common council was and has been governed by certain rules enacted by said common council, regulating and governing the deliberations and proceedings of the common council of said city, which rules were, on August 27, 1894, in full force and effect; section 21 of which reads as follows:

"All ordinances shall be read three times before being passed, and no ordinance shall pass or be read ⁵³⁰ the third time in the same meeting it was introduced; provided, that the council may suspend this rule by a two-thirds vote and put an ordinance upon its passage, by once reading and at the time it is read."

That said rule 21 was adopted by the common council of said city on May 26, 1873, and was a rule to which said council had yielded obedience from the time it was adopted, as aforesaid, until August 27, 1894, when said council attempted to repeal it, as hereinafter set forth; that on said date, at the regular meeting of said council referred to, the ordinance providing for the creation of the pretended additional or fourth ward was introduced and passed by said council, composed of only six members, without suspending said rules, or either of them, by a two-thirds vote before the enactment of said ordinance, the same having been read and put upon its passage at said regular meeting; that but three members of said council voted for said ordinance and three against it, and there being a tie, the mayor, Charles P. Drummond, cast the deciding vote in favor of said ordinance, and he then and there declared said ordinance duly enacted. And that was all the action ever taken by said council and said mayor in the enactment of said ordinance. And that the only appointment of relators to the offices of councilmen which they claim to hold, was made under the ordinance creating said fourth ward, so enacted in violation of said rule to fill the vacancies supposed to exist by the creation of such new ward.

These facts were held, on the former appeal, to constitute a good return to the writ of mandate and a complete defense to the proceeding. The facts are more fully set forth in that opinion, and the authorities bearing upon the question thus presented are exhaustively reviewed therein.

On the filing of the above amended second paragraph, ⁵³¹ which is not materially different from the original, the relators sought to raise, as they claim, a new question by filing the reply, the sustaining a demurrer to which is assigned as the only error on this appeal.

The substance of the reply is, that the rules mentioned in defendant's answer were not in force or effect on the day of the passage of the said ordinance; that the common council never prescribed or adopted by ordinance any rules or regulations for the government of the official conduct of said common council, and that said section 21 of said rules was never adopted by the common council of said city by ordinance or resolution. That the rules, a copy of which are made a part of defendant's answer, were adopted by the common council of said city in the manner and at the time as follows, namely: At a special meeting of the common council, held May 19, 1873, on motion of Councilman Johnson, a committee of three was appointed by the mayor to report rules regulating the order of business to govern the council in the transaction of all business that may come before it, said committee consisting of Councilmen Johnson and Mayer, and by unanimous request of the council, the mayor consented to serve as the third member of the committee; that at a regular meeting of the common council of said city, held on May 26, 1873, the said committee so appointed the week before, reported to said council a list of rules regulating the order in which the council shall conduct their deliberations, which after being read, were, on motion of councilman Mayer, seconded by Brownlee, adopted by unanimous vote of the council. That said list of rules is the identical schedule or list of rules set up in the answer of the defendant, and that said rules were never adopted in any other or different manner. And as thus adopted they were recognized by the common ⁵³² council as in full force and obligatory upon it until August 27, 1894, when they were repealed by a majority vote of the common council of said city when in regular session, on a motion duly made and seconded by members of said common council, which repeal was effected before the passage of the ordinance creating said additional or fourth ward, and at the time of the passage of said ordinance there were no rules whatever in force regulating and governing the council in the transaction of its business.

It is contended by the appellee that the facts set forth in this reply do not present a materially different question than that

presented on the former appeal by the answer and the evidence, and we are inclined to think that is so. At least, the relators are very late in presenting the question, if the reply does present a different question than that presented and decided against them on the former appeal. They ought to have presented their whole case then, if they did not, and have it decided in the one appeal.

The contention is, that these rules do not rise to the dignity of ordinances, and hence, in order to effect their repeal it is only necessary to produce an act of the corporation of equal grade or dignity with them. Webster defines an ordinance to be a rule established by authority. Dillon says, "under the general term of 'ordinances' have sometimes been included all the regulations by which a corporation is itself governed. . . . Indeed, in general and professional use, the term 'ordinance' is almost, if not quite, equivalent in meaning to the term 'by-law'": 1 Dillon's Municipal Corporations, sec. 307. The reply concedes that these rules were duly enacted by the common council and had been in full force more than twenty years, and that they were in writing and had ⁵³³ been recognized by the council as binding on it for over twenty years.

And the reply further concedes that their repeal was attempted to be effected in order to obviate the necessity of a two-thirds vote to suspend rule 21, and that the attempted repeal was by a mere verbal motion.

The precise question arising upon these facts was decided against appellants on the former appeal in the following language:

"The verbal motion made by this councilman as recorded by the clerk by which it was sought to effectually repeal the rules ordained for the government of the council was, to say the least, somewhat indefinite. . . . If the procedure by which the power of repeal was attempted to be exercised upon the occasion in question, could be sustained, then all that would be necessary to accomplish the repeal of all existing ordinances of a city would be the adoption, at any regular meeting by the common council, of a mere verbal and general motion to that effect, without any reference whatever to the title, number, or date of passage of the ordinance or ordinances intended to be repealed. In the case of *Bills v. Goshen*, 117 Ind. 221, it was held by this court that a defect in an ordinance could not be cured or amended by means of a motion subsequently made by a member of the council and put to a vote and carried."

It was adjudged that the attempted repeal of the rules was ineffectual, and that therefore the enactment of the ordinance creating the fourth ward to fill the supposed vacancy in which the raters were appointed was void because passed in violation of rule 21.

That decision is the law of the case, and it consequently follows that the reply in question did not state facts sufficient to avoid the answer.

Therefore, the circuit court did not err in sustaining the demurrer to said reply.

Judgment affirmed.

MUNICIPAL CORPORATIONS—ORDINANCES, BY-LAWS AND RESOLUTIONS.—The term "ordinance," as applied to enactments of the law-making power of a municipality, is analogous, if not entirely identical, with by-laws. No necessity seems ever to have arisen which made it desirable that any distinction affecting their legal signification should be made. Their legal character is the same: Monographic note to *Robinson v. Franklin*, 24 Am. Dec. 631.

CASES
IN THE
SUPREME COURT
OF
IOWA.

SEEVERS v. GABEL.

[94, IOWA, 75.]

APPELLATE PRACTICE.—Instructions clearly relating to matters of law involved in a case as shown by the pleadings independent of the evidence may be reviewed on appeal, although none of the evidence is presented by the record.

LANDLORD AND TENANT—LEASE, CONSTRUCTION OF—LESSEE'S LIABILITY FOR LEASED PROPERTY.—If a lease provides that the leased property shall be returned, "in as good condition as it now is, usual wear excepted," the tenant is not liable in damages, if the property is, during the term of the lease, destroyed by fire without fault on his part.

Action on a lease of a "saw rig," the lease providing that such property should be returned upon the expiration of the term "in as good condition as it now is, usual wear excepted." During the term, the property was destroyed by fire without fault on the part of the lessee; and the lessor brought this action to recover damages. Judgment for plaintiff, and defendants appealed.

Bolton & McCoy, for the appellants.

Seever & Seever, for the appellee.

78 GIVEN, C. J. 1. The record before us shows that no transcript of the reporter's notes of the evidence in this case was filed with the clerk of the district court until after this appeal was taken, and appellee had filed an amended abstract denying appellants' abstract, and alleging and showing that the evidence had not been preserved as required. Appellee contends that, as

the evidence is not before this court, we cannot consider the errors assigned by appellants on the giving and refusing of instructions. The instructions given, which are complained of, clearly relate to a matter of law involved in the case, as shown by the pleadings independent of the evidence. It is a question of the construction that should be given to the written contract sued upon and admitted. Other errors ⁷⁷ assigned cannot be considered, in the absence of the evidence duly preserved and authenticated.

2. The question to be considered is whether the court erred in giving the following instructions: "3. Evidence has been offered tending to prove that during the term of the lease the property leased by the plaintiff to the defendants was injured by fire. Defendants' contention is, that the fire terminated the contract of lease, and released the defendants from all liability, excepting for the rent that had accrued up to the date of the fire. 4. You are instructed that this would be true but for the terms of the contract itself, which provide that 'the defendants, at the expiration of the time mentioned in the lease, were to return the said property in as good condition as it now is, usual wear excepted,' and this clause imposes upon the defendants the obligation of returning the property notwithstanding the fire. If they have failed to do so, then plaintiff will be entitled to recover damages, measured by the rule hereinafter given." Appellants complain of that part of the instructions that states that the clause of the contract quoted "imposes upon the defendants the obligation of returning the property notwithstanding the fire," or to respond in damages. They cite authorities as to the different kinds of bailments, and the care required of bailees, and contend that under this contract they are not liable for injury to the property occurring without their fault. There is no question of negligence involved in this inquiry. The instructions complained of are grounded upon the assumption that the property was injured without fault on the part of appellants. Appellee concedes, as do the instructions, that appellants would not be liable, in the absence of the express contract with respect to the return of the property. He contends, and correctly so, that the liability which the law would imply in the ⁷⁸ absence of contract may be enlarged by contract. His claim is, that under this contract the appellants are absolutely bound to return the property, or, in case of its unavoidable loss or injury, to respond in damages. In the absence of a contract, the law would

imply a promise on the part of appellants to return the property at the expiration of the term in as good condition as when received, ordinary wear and decay excepted. Aside from naming a place to which the property was to be returned, this is just what the parties have expressed in their contract. Surely, appellants' liability is not enlarged by expressing in the contract just what the law would have implied; yet it is not claimed that appellants would be liable under the implications of the law. That a place is named to which the property was to be returned does not enlarge appellants' liability. The sole contention is, whether, under that part of the contract quoted in the instructions, appellants are bound to return the property, or to respond in damages, notwithstanding its destruction by fire without fault on their part. It is simply a question as to the proper construction of this contract. Appellee cites the rule that "where the party, by his own contract, creates a duty or charge upon himself, he is bound to make it good, notwithstanding any accident or delay by inevitable necessity, because he might have provided against it by contract." Our inquiry is, whether the appellants did, by this contract, create the duty or charge upon themselves to return the property, or respond in damages in case of its unavoidable destruction. If they did so, they are liable; otherwise, not. We will be aided in this inquiry by referring to the construction given by the courts to similar contracts. Among the many cases that might be cited, we refer to the following: In *McEvers v. The Sangamon*, 22 Mo. 188, a barge was hired by the defendant under an agreement that it was "to be delivered in good order, the usual wear and tear excepted." The barge was destroyed by ice, and it was held that the steamboat was not liable, on the contract, for the nondelivery of the barge. In *Young v. Bruce*, 5 Litt. 324, the contract was for the hire of a slave "until said 25th of December, 1819, to be returned, well clothed, at that time." Defendants answered that the slave was drowned by inevitable accident, without fault of theirs, whereby they were prevented from returning him. The court held that it was not the intention of the parties that the defendants should be responsible for the death of the slave without fault on their part, and that the demurrer was properly overruled. In *Harris v. Nicholas*, 5 Munf. 483, the contract was for the hire "of four negro fellows the present year, who are to be returned well clothed, on or before the 25th of December." Defendant answered that before the expiration of the time one of the negroes,

without fault on defendant's part, departed this life. The court held that if the covenant could be considered "as a covenant to return the negro in question, as well as to secure the payment of the money due for his hire, it ought not to be considered as a covenant to insure such return in the event which has happened." In *Maggott v. Hansbarger*, 8 Leigh, 532, the plaintiff leased to the defendant certain real estate, upon which there was a grist-mill and carding machine, defendant agreeing "to return the said property with all its appurtenances." The mill and carding machine were destroyed by fire accidentally, or by some unknown incendiary. It was held that the contract was distinguishable from those wherein the party covenants to keep in order, and that the tenant was not bound to rebuild. In *Warner v. Hitchins*, 5 Barb. 666, the defendants bound themselves, "at the expiration of the lease, to surrender up ^{so} possession of the premises in the same condition they were in at the time of making the lease, natural wear and tear excepted." The court, after a thorough and extended consideration of the subject, held that the tenants were not bound to put up new buildings in the places of those destroyed by fire, distinguishing the case from those wherein covenants to repair are made. In *Wainscott v. Silvers*, 13 Ind. 497, it was held that a tenant is not answerable, in the absence of an express agreement, for the destruction by accidental fire of buildings occupied. This case is clearly distinguishable from those wherein there is an agreement to keep leased property in repair. There are many cases holding that under contracts containing such a covenant the tenant was bound to restore the buildings, if they were destroyed by fire: See *David v. Ryan*, 47 Iowa, 642; *Van Wormer v. Crane*, 51 Mich. 363; 47 Am. Rep. 582.

Appellee cites and relies upon the case of *Drake v. White*, 117 Mass. 10, and *Harvey v. Murray*, 136 Mass. 377. In the first case the contract was as follows: "Received of John E. Drake one Morris & Ireland fireproof safe, which we promise to deliver the same to said Drake, or its equivalent in money, on the payment of a certain note signed by said Drake." The property was destroyed without fault of the defendants. The court says: "In the present case the parties have reduced their contract to writing, and have omitted to attach to the defendants' liability for the property any limitation whatever. On the contrary, their express promise is to do one or the other of two things—either to return the property specifically, or to pay for it in money."

The conclusion is based upon this expressed agreement. In this case we have no agreement to return the property or its equivalent in money. In the other case, defendant rented a piano and agreed "to ⁸¹ return it in as good order as when received, customary wear and tear excepted." The piano was injured by inevitable accident. The court says: "This case falls fully within the decision in *Drake v. White*, 117 Mass. 10. Indeed, the mention in the contract now before us that customary wear and tear are excepted from the defendant's agreement furnishes an additional reason for holding that injury from inevitable accident is not excepted." In our opinion those cases are clearly distinguishable from each other. In the former the property was delivered as security for the payment of a debt, under an express agreement that it, or its value in money, should be returned on payment of the debt. That was a contract to be absolutely liable; but not so in the latter case, nor in this one. We have quoted the entire opinion in the latter case, which is grounded solely upon the former, through a misapprehension, we think, of what was decided in the former. While it is identical with this, as to the question involved, we do not think it is entitled to weight as authority, nor do we think that the exception expressed in that or in this contract is any reason for holding the appellants liable for loss from inevitable accident. Inquiring, as we do, for the intention of the parties with respect to the return of this property, we cannot believe that either party understood himself as standing as an insurer to the other. The plaintiff agreed to furnish the property for use for one year, in return for the rent to be paid. It would hardly be claimed that plaintiff is guilty of a breach of this contract by failing to furnish the property for use, because of its destruction without fault on his part; yet it does not seem that the destruction of the property should be a termination of this contract as to one party more than to the other. Plaintiff's obligation to furnish the property for use is quite as explicit as is defendant's obligation to return it. There was no ⁸² adequate consideration moving to the defendants as insurers of the property. The use and the rent were equivalent. Therefore, defendants would have nothing for this extraordinary liability—a liability that should not, and, we think, would not, be left to doubtful construction, if intended, but would be plainly expressed in the contract. We are of the opinion that the defendants are not liable, under this contract, for the destruc-

tion of the property without fault on their part, and therefore that the court erred in giving the instructions complained of.

Reversed.

APPEAL—ERRORS OF LAW.—All errors of law arising upon a trial to which proper and timely exceptions are taken may be reviewed on appeal without having been embodied in a motion for a new trial: *Hunt v. Iowa Cent. Ry. Co.*, 86 Iowa, 15; 41 Am. St. Rep. 473.

LANDLORD AND TENANT—COVENANT TO SURRENDER—FIRE.—A lessee is not liable in damages for accidental loss of demised premises by fire under a covenant to redeliver them at the expiration of his term in as good order as when received, usual wear and tear and unavoidable accidents excepted: *Howeth v. Anderson*, 25 Tex. 557; 78 Am. Dec. 538, and note; *Miller v. Morris*, 55 Tex. 412; 40 Am. Rep. 814.

JACKSON v. LYNN.

[94 IOWA, 151.]

DEEDS—ESCROW—FRAUDULENT DELIVERY.—If a deed placed in escrow is fraudulently abstracted from the possession of the depository without performance of the conditions attached to its delivery, it is void in the hands of a bona fide purchaser in the absence of the negligence of the grantor being pleaded and relied upon as an estoppel.

DEEDS—ESCROW—FRAUDULENT DELIVERY—RATIFICATION.—If two persons agree to exchange lands, and one grantor delivers a deed to his property to the other grantor, who places the deed executed by him to his property in escrow with certain conditions attached to its delivery, and the first-named grantor, without performing such conditions, fraudulently takes the deed out of escrow and records it, the fact that the second grantor subsequently records the deed to the land received in the exchange, and enters into its possession, does not constitute a ratification of the deed taken out of escrow, if under the contract of exchange and the deed received by him he is entitled to the immediate possession of the property exchanged.

DEEDS—ESCROW—FRAUDULENT DELIVERY—CANCELLATION.—If two persons agree to exchange lands, and one grantor delivers a deed to his property to the other grantor who places the deed executed by him to his property in escrow with certain conditions attached to its delivery, and, under the contract of exchange, the property of the first-named grantor is to be forfeited if such conditions are not complied with, and such grantor, without complying with the conditions, fraudulently takes the deed in escrow from the possession of the depository, the second-named grantor may maintain an action to cancel the deed taken out of escrow, without tendering back the land received in exchange.

S. R. Anstine and M. F. Stookey, for the appellant.

E. W. Curry, for the appellee.

¹⁵³ DEEMER, J. In the month of July, 1890, the plaintiff, being the owner of the land in controversy, which is located in Decatur county, and also an "equity" in some Kansas lands, entered into negotiations with the defendant David A. Lynn, a resident of Omaha, for the exchange of these lands for a town lot in the city of Omaha, belonging to Lynn. The parties finally agreed upon the terms of an exchange and repaired to the office of an attorney named Ledwich, to have their agreement reduced to writing. This attorney made out a written contract between the parties, which was signed by each of them, and which recited, in substance, that whereas Lynn had conveyed to the plaintiff the Omaha lot subject to a mortgage of four thousand dollars; and whereas there were mechanic's liens then filed against the property for seven hundred and eight-four dollars and ninety-three cents, which, with any other liens that might be thereafter filed against the property for labor and material, Lynn agreed to pay, the seven hundred and eighty-four dollars and ninety-three ¹⁵³ cents within thirty days, and any other liens as soon as filed; and whereas Lynn further agreed to build on said premises a barn to cost not less than seven hundred dollars, according to certain plans and specifications, the same to be built within forty-five days, and also agreed to pay and discharge a certain mortgage against the lot for one thousand and sixty dollars and another mechanic's lien for the sum of three hundred and twenty-nine dollars and eighty-four cents, with the interest accruing on each and all these amounts, and within five days to furnish an abstract of title showing perfect title to the lot in question in Lynn, free from all claims except the four thousand dollars and the mechanic's lien for seven hundred and eighty-four dollars and ninety-three cents; and whereas the said Alma Jackson has agreed to convey to Lynn the land in controversy in part consideration for the premises aforesaid: Therefore it is agreed that, to secure the payment of the mechanic's lien and the building of the barn by Lynn, that Jackson shall deposit the deed to the Decatur county land in escrow with James Ledwich, and the same to be delivered to Lynn upon the full performance by him of all the agreements on his part; and upon the failure of Lynn to perform his agreements within the time limited then the deed to the Iowa land was to be turned back to Jackson, and title thereto was to revert immediately to him. The building of the barn and the payment of the liens by Lynn were expressly made a part of the consideration for the Iowa land. Pursuant to this contract, plaintiff deeded to Lynn the Kansas

land, and made out and deposited a deed for the Iowa lands with Ledwich, to be by him held in escrow in accordance with the terms of the contract, and Lynn executed and delivered to plaintiff a deed for the Omaha lots. Lynn did not, however, pay the liens upon the Omaha property, or any part thereof; nor has he ever complied ¹⁵⁴ with the conditions of the contract, performance of which was necessary to entitle him to the deed for the Iowa land. A few days after the execution of the contract, and about the twenty-fifth day of July, plaintiff and Lynn went to the office of Ledwich to examine the plans and specifications for the barn, and while there, Lynn surreptitiously and fraudulently extracted the deed from the possession of Ledwich, without the consent of either plaintiff or Ledwich, and within the next day or two executed a deed for the premises to the defendant Rich, who was an employé in his (Lynn's) office, and Rich immediately sent this deed and the deed Lynn had abstracted from the custody of Ledwich to Decatur county, and had the same recorded. About the sixteenth day of August, 1890, plaintiff executed a deed for the premises to one Barney Gribble, but he claims, while this deed was absolute on its face, yet it was in fact intended as a mortgage to secure the sum of two thousand dollars borrowed from Gribble. On the twenty-first day of August, and a short time after he discovered that the deed to Lynn had been placed upon record, plaintiff commenced this suit to set aside the deeds from himself to Lynn and from Lynn to Rich, and to have the deed to Gribble declared a mortgage. Service was had by publication, and a default was taken, and decree rendered as prayed, in November, 1890. In August, 1892, defendant Rich appeared, had the default set aside, and filed an answer and cross-petition and Gribble filed a petition of intervention, claiming absolute title to the premises. The court below, after hearing the testimony, granted to plaintiff the relief demanded, and continued the case as to the issue presented by Gribble's petition of intervention. Defendant Rich appeals.

1. It clearly appears from the foregoing statement of facts that the deed from plaintiff to Lynn is of ¹⁵⁵ no validity, because it was never delivered, but, on the contrary, was fraudulently abstracted from the possession of the depository, Ledwich, and is therefore void, not only as to Lynn, but also as to Rich, unless there is something in the defense interposed, which will save the title to him: *Golden v. Hardesty*, 93 Iowa, 622; *Patton v. Cook*, 83 Iowa, 71; 1 *Devlin on Deeds*, secs. 267, 268; *Everts v. Agnes*,

4 Wis. 343; 65 Am. Dec. 314; Tisher v. Beckwith, 30 Wis. 57; 11 Am. Rep. 546; Haven v. Kramer, 41 Iowa, 382. The two defenses pleaded by Rich which we will notice are: 1. That he purchased the land in controversy from his codefendant Lynn on or about July 25, 1890, for a valuable consideration, and in good faith, without notice or knowledge of any equity, right, or title claimed by the plaintiff therein; and 2. That plaintiff, on the nineteenth day of August, 1890, and after learning that the deed to Lynn had been recorded, recorded the deed he received from Lynn for the Omaha property, and went into possession of the premises, and continued to use and occupy the same as owner up to the present time.

As to the first defense, it is sufficient to say that if the deed was fraudulently and wrongfully obtained from Ledwich, as charged, it will no more pass title to the supposed grantee, Lynn, than if it were a forgery, and will not transfer title to subsequent purchasers without notice: Tisher v. Beckwith, 30 Wis. 57; 11 Am. Rep. 546; Everts v. Agnes, 4 Wis. 343; 65 Am. Dec. 314. The grantor in such a case may have been so negligent, or his carelessness and inattention to the rights of others may have been so marked, that the law will estop him from claiming title as against a bona fide purchaser for value. But where such negligence or carelessness or inattention, either before or after delivery of deed, is relied upon as an estoppel, it must be pleaded as such before the subsequent grantee can rely thereon: Golden v. Hardesty, 93 Iowa, 622. ¹⁵⁸ In this case no estoppel was pleaded, so we have no occasion to consider whether defendant Rich was a bona fide purchaser or not.

It is next insisted that plaintiff ratified, or at least acquiesced in, the delivery of the deed to Lynn, by taking possession of the Omaha property, and occupying and using the same as owner. That one can ratify and confirm a deed surreptitiously obtained must be conceded. And the question here is, Did plaintiff so ratify and confirm the deed to Lynn by recording the deed to the Omaha property, and taking possession of the lot, as that he is bound thereby? To determine this we must look to the nature of the action, the contract, and the surrounding circumstances. We have seen that at the time the contract was made plaintiff deeded to the defendant Lynn, by absolute deed, the Kansas land, which, it is true, was of but little value and received from Lynn a deed for the Omaha property, which he was at liberty, under the terms of the contract to place on record at any time. This Omaha property, as it stood, was of little value,

because of the encumbrances placed upon it. It became valuable because of Lynn's promise to remove encumbrances against it, amounting to more than two thousand one hundred dollars, and to build a barn costing not less than seven hundred dollars; and the deed to the Iowa land was made out and deposited in escrow, to be delivered when Lynn removed these encumbrances, built the barn, and furnished an abstract of title as stated. The contract expressly provided that, unless these things were done within the times named for their performance, the deed to the Iowa land was to be "turned back" to plaintiff, and the title to the land was to immediately reinvest in him. That we may better understand the contract and conduct of the parties, it should be stated that the value of the Iowa land, ¹⁵⁷ over and above the encumbrances against it, was about the amount of the encumbrances against the Omaha lot and the seven hundred dollar barn which Lynn was to erect. Now it quite clearly appears that the plaintiff had the right under the contract to take possession of the Omaha property, and record the deed thereto at any time, without in any manner waiving the performance of the contract by Lynn. Lynn received a deed to the Kansas land, and went into the possession thereof immediately, but the deed to the Iowa land was not to be delivered until Lynn paid off the encumbrances, and built the barn as agreed; and, if this was not done, then the deed was to be returned to plaintiff and title was to reinvest in him. We do not see how the recording of the Omaha deed, and the taking possession of the property by plaintiff, can be considered a ratification of Lynn's wrongful act in surreptitiously taking the deed from the custody of the depository.

It is also said in argument that plaintiff cannot maintain this suit without tendering back a deed to the Omaha property, and accounting for the rents received. It will be observed that this is not an action to rescind the contract entered into between the parties for fraud, in which event plaintiff would be compelled to make tender back of all he had received; but that it is an action to set aside a stolen deed, in which plaintiff is insisting upon the letter of his contract. There is nothing for him to tender back. Defendant has forfeited all his rights to the deed by failing to perform the conditions which entitle him to it, and under the express terms of the contract plaintiff is entitled to the land in controversy, and to the return of the deed, without tendering back anything. The deed to the Omaha property was absolute, and plaintiff's rights therein were not to be affected

by any failure of defendant Lynn to perform ¹⁵⁸ the conditions which entitled him to the deed for the Iowa land. The Omaha lots were forfeited to plaintiff by the very terms of the contract, or, if not so forfeited, plaintiff was not, under the circumstances, required to tender them back before enforcing his remedy to cancel the deed which had been fraudulently and wrongfully obtained.

We have not considered the question as to whether Rich was an innocent purchaser, because we do not deem it necessary to determine it. If it were material to a proper decision of the case, we would be in grave doubt whether he had established his claim or not. As the court below did not consider the petition of intervention of Gribble, but continued the case as to him, we have no occasion to further refer to the issue presented thereby. A careful perusal of the whole record leads us to the conclusion that the decree of the district court is right, and it is affirmed.

DEEDS—ESCROW—FRAUDULENT DELIVERY.—As between the grantor in escrow and a purchaser from the grantee therein, who had fraudulently procured its delivery to him, the superior equity is with the original owner, who has never voluntarily parted with his title: *Everts v. Agnes*, 4 Wis. 343; 35 Am. Dec. 314, and note. Contra, see *Blight v. Schenck*, 10 Pa. St. 285; 51 Am. Dec. 478; *Quick v. Milligan*, 108 Ind. 419; 58 Am. Rep. 49.

EQUITY—JURISDICTION TO CANCEL DEED FOR FRAUD.—A court of equity will set aside a conveyance at the instance of a grantor, if the parties did not stand on an equal footing, and the conveyance was procured through the false representations of the grantee: *Harper v. Harper*, 85 Ky. 160; 7 Am. St. Rep. 583, and note; *McLaughlin v. McCrory*, 55 Ark. 442; 29 Am. St. Rep. 56; *Matlack v. Shaffer*, 51 Kan. 208; 37 Am. St. Rep. 270.

MESERVEY v. SNELL.

[94 Iowa, 222.]

DEEDS—WARRANTY OF TITLE—LIABILITY FOR BREACH OF.—If a grantor covenants to warrant and defend a title acquired under a swamp land entry which is subsequently illegally canceled and set aside, and such illegality is successfully shown by the grantee of the entry man, in an action against him attacking his title, the failure of such grantor to appear in such action and defend the title when notified and requested to do so, is a breach of his warranty, rendering him liable to the grantee for reasonable attorney's fees and expense incurred in defense of the title.

COVENANTS OF WARRANTY—BREACH OF—ATTORNEYS FEES AS DAMAGES.—Attorney's fees are a lawful element of damages to be recovered for a breach of a covenant of warranty.

whenever they are reasonable and necessary in defense of the title especially if the warrantor has been notified of the litigation and given an opportunity to protect his warranty.

F. Farrell, for the appellant.

Botsford, Healy & Healy, for the appellee.

²²² ROBINSON, J. In July, 1866, the defendant, for the consideration of one hundred and fifty dollars, conveyed to the plaintiff forty acres of land in Webster county. The deed of conveyance contained a covenant in words as follows: "And we covenant to warrant and defend said premises against the lawful claims of ²²³ all persons whomsoever." The plaintiff then conveyed the land by warranty deed to Patrick Connors. The title of the defendant was derived from the act of Congress approved September 28, 1850, which granted to the state of Arkansas, and other states, swamp and overflowed lands within their limits, and through acts of the general assembly of this state. The land was within the limits of the grant made to the state of Iowa by the act of Congress approved May 15, 1856, to aid in constructing a railway from Dubuque to a point on the Missouri river near Sioux City, and was claimed by the beneficiaries of the grant as being a part of it. About the year 1880, William Ragan, a grantee of the railway company which claimed the land, procured, through the government landoffice, a cancellation of the swamp land entry, and then obtained from the United States government a certificate of the land to the beneficiary of the railroad grant. At the time of the cancellation of the swamp land entry, the officials of the landoffice required that notice be given to interested parties; but none was given to the plaintiff, nor to her grantee, Connors. After the swamp land entry was canceled, Ragan instituted against Connors an action to recover the land, and obtained judgment for its possession. Connors then purchased the outstanding title. The plaintiff was not made a party to the action, and neither she nor the defendant had any notice of it. After judgment was rendered in the action against Connors, and after he had purchased the outstanding title, he commenced an action against the plaintiff to recover damages for a breach of her warranty to him. In that action she successfully defended the title she had acquired from the defendant, asserting its validity, and claiming that the cancellation of the swamp land entry was invalid. After the action against her was commenced, she gave ²²⁴ to the defendant notice of it, and demanded that he appear and defend the title acquired

from him. He failed to appear, and she made the defense at a cost to herself of fifty dollars for attorney's fees in the district court, and fifty-seven dollars and fifty cents attorney's fees, and five dollars as expenses in this court, to which an appeal was taken. She seeks to recover for those sums, and obtained judgment for them in the district court. The appellant contends that, as the title he transferred to the plaintiff was sustained in the action against her, he is not liable on his warranty, while she claims that, as the swamp land entry under which he claimed had been canceled, the title under the railroad grant appeared to be superior to that she had acquired from him, and that it was his duty to protect what he had conveyed.

1. The form of warranty given in section 1970 of the Code is as follows: "And I warrant the title against all persons whomsoever." It has been held to be the same in legal effect as the common-law covenant of general warranty: *Funk v. Creswell*, 5 Iowa, 63, 82; *Rawle on Covenants*, sec. 116. That is said to be a covenant "to warrant and defend the title against the lawful adverse claims of all persons whomsoever": *Tiedeman on Real Property*, sec. 858. In legal effect it is much the same as a covenant for quiet enjoyment: *Tiedeman on Real Property*, sec. 855. Such covenants do not protect the grantee against every adverse claim or suit, however unfounded, for which the grantor is not responsible, but only against persons making adverse claims based upon a legal foundation: *Akerly v. Vilas*, 23 Wis. 222; 99 Am. Dec. 165; *Gleason v. Smith*, 41 Vt. 293; *Underwood v. Birchard*, 47 Vt. 306; *Noonan v. Lee*, 2 Black, 499; *Devlin on Deeds*, sec. 932. It is not essential to a breach of the covenant of warranty of title that there be an actual eviction. A constructive eviction is sufficient: ²²⁵ *Funk v. Creswell*, 5 Iowa, 63; *Brandt v. Foster*, 5 Iowa, 289; *Eversole v. Early*, 80 Iowa, 604. The case of *Yokum v. Thomas*, 15 Iowa, 67, was an action upon the covenants of a deed which are stated to have been that the grantor "is lawfully seised, that he has a good right to convey, that the premises are free from encumbrance, and that he will warrant and defend." The facts found were that the grantor had entered the land with a land warrant, and conveyed it to the plaintiff, that afterward an assignment of the location and warrant was obtained from the grantor by fraud, and that upon the assignment so obtained a patent was procured from the United States. The plaintiff commenced an action in equity to set aside the patent, and was successful. He then sought to re-

cover of his grantor the expenses incurred in prosecuting the action. This court held that the covenants of the deed were broken, and the reason upon which that conclusion was based was, that when the fraudulent assignee of the location and warrant "obtained the patent from the United States the legal title was vested in her, and upon this title she could have brought her action of right, and, notwithstanding the paramount equities of the plaintiff, could have obtained a judgment evicting her from the premises." The statement quoted is applicable to the facts in this case. When the swamp land entry was canceled, and the land had been certified to the beneficiary of the railroad land grant, its grantee held the legal, and apparently a valid, title, which would have prevailed in a court of law against the equitable title which Connors held from the plaintiff. In other words, there was a constructive eviction, and, under the rule of *Yokum v. Thomas*, 15 Iowa, 67, a breach of the covenants of the deed of the defendant to the plaintiff. He was duly notified of the litigation pending against his ²²⁶ grantee, and was required to defend the title he had conveyed, but failed to do so. This case and *Yokum v. Thomas*, 15 Iowa, 67, are peculiar and distinguishable from most others by the fact that the general government, the source from which the title emanated, with power in the first instance to determine its grantees, had apparently set aside all acts and proceedings by which the first title was created, and had issued muniments of title to another grantee. Following the rule in *Yokum v. Thomas*, 15 Iowa, 67, we must hold that there was a breach of the covenant of warranty made by the defendant.

2. Whether attorney's fees are a lawful element of damage to be recovered for a breach of the covenant of warranty is a question which does not appear to have been expressly decided by this court. In *Yokum v. Thomas*, 15 Iowa, 67, the plaintiff sought to recover for attorney's fees and costs paid and for time spent. It was not intimated that a recovery for such expenditures could not have been had in a proper case, but it was said that the defendant should have had an opportunity, which he did not have, to protect himself against such costs, or to institute proceedings to protect the title he had warranted. In *Swartz v. Ballou*, 47 Iowa, 188, 29 Am. Rep. 470, the plaintiff sought to recover the possession of real estate. The defendant claimed title under a warranty deed from the plaintiff, and demanded the allowance of a reasonable attorney's fee on account of the covenant of war-

ranty, for protecting his title. The right to recover such fee was referred to, and it was said that the authorities were not uniform as to the right of the grantee to recover them unless they were taxable as costs. A recovery for such fees was denied in that case, because it was not shown that the defendant had paid, or was under obligations to pay, any specific sum as attorney's fees. In *Brandt v. Foster*, 5 Iowa, 289, the measure of damage for ²²⁷ the breach of a covenant of warranty was considered, but nothing was said in regard to the recovery of attorney's fees. They were considered in *Myers v. Munson*, 65 Iowa, 428, but no opinion was expressed as to the right to recover them. The practice of allowing such fees is not uniform, but the weight of authority seems to be in favor of allowing them if necessary and reasonable, especially if the warrantor has been notified of the litigation, and given an opportunity to protect his warranty: See *Rawle on Covenants*, secs. 197-201, and notes; 2 *Sutherland on Damages*, 301-309, and notes. We are of the opinion that they should be allowed in this case. They were absolutely necessary to protect the real against the apparent title. They were made necessary by a defect in the legal title, which the defendant had warranted. Unless they are recoverable, the warranty of the grantee is of no practical value in such a case as this. The expenses for which the district court rendered judgment were reasonable in amount, necessary, and have been paid by the plaintiff. They were incurred after notice of the litigation had been given the defendant, and he had failed to take charge of it. We conclude that there is no valid objection to the action of the district court in allowing them, and its judgment is affirmed.

DEEDS-WARRANTY OF TITLE-DAMAGES FOR BREACH-ATTORNEY'S FEES.—The measure of damages for a total or partial breach of the covenant of warranty of title in a deed of land is discussed in the extended note to *Brooks v. Black*, 24 Am. St. Rep. 266-268. On the question of the allowance of attorney's fees in the action in which the injured party is evicted there is a decided conflict of authority: *Brooks v. Black*, 68 Miss. 161; 24 Am. St. Rep. 269, and extended note. See, also, *Gragg v. Richardson*, 25 Ga. 566; 71 Am. Dec. 180, and note.

PACKARD v. VOLTZ.

[94 Iowa, 277.]

COUNTIES — LIABILITY OF FOR NEGLIGENCE OR MALICE OF AGENTS.—A county is exempt from liability for doing a lawful act in a negligent manner, and this exemption extends to its officer or agent, although the latter shows malice in the performance of the act.

Petition to abate a nuisance and to recover five hundred dollars damages. The plaintiff owned land in two sections in a township in Butler county, Iowa. Between such sections there was a public highway, across which a natural drainage depression extended. A culvert or bridge about twelve feet long and four feet high had been erected across the highway, but it was not sufficient to carry off the water without causing an overflow of plaintiff's lands. The board of supervisors of said county authorized and directed the defendants Voltz and Ray to take out said bridge and substitute tiling for it of less capacity to carry off the water. This was done, and plaintiff alleged "that, in directing and executing the work, Ray and Voltz acted with wanton disregard to the rights of plaintiff, and with a malicious intent thereby to injure his property and cause him pecuniary loss and damage, and that said drainage was not planned or executed with reasonable skill, and the waterway was entirely inadequate to carry off the water," thereby creating a nuisance. Demurrers by defendants were sustained, and plaintiff appealed.

Hemenway & Grundy, for the appellant.

Courtright & Arbuckle, for the appellees.

²⁷⁸ GRANGER, J. 1. The grounds of the demurrer are several, and it will be unnecessary to specify them, as we shall dispose of the points on the line indicated in argument. We will first notice the question as to the liability of the county. By section 1, chapter 200, of the acts of the twentieth general assembly it is provided: "The board of supervisors of each county may, at the time of levying taxes for other purposes, levy a tax of not more than one mill on the dollar of the assessed value of the taxable property in their county, which tax shall be collected at the same time and in the same manner as ²⁷⁹ other taxes are collected, and shall be known as the county road fund, and shall be paid out only on the order of the board of supervisors for work done on the highways of the county in such places as the board shall determine." The work done on the highway was

in pursuance of this provision, and we are to determine whether or not, in the doing of such work, the county is liable for the negligence of its agents or employées. We think the holdings of this court, upon analogous facts, are decisive of the question. But for the rule announced in *Wilson v. Jefferson Co.*, 13 Iowa, 181, and the cases adhering to it, the one now contended for would have no authoritative support in this state. The rule of that case has been doubted, and the doubt, on common-law authority, has recognition in the holding of this court. In *Kincaid v. Hardin Co.*, 53 Iowa, 430, 36 Am. Rep. 236, speaking of that case, and of its standing "almost, if not quite, alone," support is given to the holding because of its existence for so long a time as to "have the implied sanction of the law-making power and the people of the state"; and it is there said that "we have no disposition to carry the doctrine further than to sustain the decisions of the court." The case of *Green v. Harrison Co.*, 61 Iowa, 311, was to recover damages because of the negligent construction of a ditch by the county, resulting in damage to plaintiff. The case distinguishes *Kincaid v. Hardin Co.*, 53 Iowa, 430, 36 Am. Rep. 236, from the line of bridge cases, and follows it. *Green v. Harrison Co.*, 61 Iowa, 311, is quite significant as authority in this case because of its application being peculiarly local, which is a reason urged in this case to distinguish it from the rule of *Kincaid v. Hardin Co.*, 53 Iowa, 430, 36 Am. Rep. 236, where the duty performed was the construction of a courthouse, and importance was attached to the mandatory character of the duty on the part of the board of supervisors. *Green v. Harrison Co.*, 61 Iowa, 311, and this are essentially similar as regards the discretionary power ²⁸⁰ of the board and the local importance of the work performed. The following cases further support the conclusion: *Soper v. Henry Co.*, 26 Iowa, 264; *Nutt v. Mills Co.*, 61 Iowa, 754. Under these authorities the petition does not state a cause of action against the county.

2. It is not important to determine the liability of the defendants other than the county. The legal right of the board of supervisors to make the improvement is not doubted, in the absence of negligence. We hold that the county is not liable for the negligence of its agents or employées in the discharge of such a duty. It is necessary here to inquire as to the discretion exercised by these defendants, and a reference to the petition shows that in all particulars they acted by the authority of the board of supervisors, and that what was done was what the

board directed. This authority seems to have been extended as well to the manner of doing the act as to the act itself. The doctrine upon which the county is held not liable is, that it is a "territorial and political division of the state, created for governmental purposes, and gave no assent to its creation." It is an involuntary corporation. This means that such a corporation is forced into existence for the discharge of such governmental duties as are imposed by the law, and that all such duties, because of its corporate character, must be discharged through agents or employes. It must certainly be an anomalous doctrine that would exempt the corporation itself from liability for the doing of a lawful act in a negligent manner upon the ground of its compulsory agency in behalf of the public welfare, and at the same time affix a liability upon its agent for precisely the same acts done under express authority. We think an instance of such liability is not to be found. It must be a reason for the rule of exemption, on the ²⁸¹ part of a political corporation, that its agency is a public necessity, and it seems to us that the same law that would give it exemption from liability for negligence would protect from liability the servant through whom, only, the corporation can discharge its duty to the public. We have not been cited to nor have we been able to find, a case precisely in point. Mr. Wood, in his law of Master and Servant, second edition, page 665, while speaking of the liability of servants, makes an exception, and says, "As to all acts which, if done by the master himself, the master could have justified, no liability exists against the servant." The rule has such strong support in reason that it does not seem to have become a subject of extended judicial comment. It seems to us that the rule thus stated is directly applicable to this case. Legally, the county justifies, in that it has done no act for which it is liable, and hence its agent, through whom it did the act, is for the same reason justified. The same public policy that would give justification to the corporation would extend it to the legitimate means for doing the act. Extended citations might be made as to the liability of servants where both the servant and the employé are negligent, and where such liability is joint, but they do not to any great extent control this case. The case is peculiar because of the exceptional rule which operates to excuse the county from the general rule as to negligence. Importance is attached to the fact that the petition shows that the acts were done maliciously. The averments of malice are as to the defendants Ray and Voltz, and they only show the personal feel-

ings under which they acted. From the petition it is clearly manifest that without the malice the results would have been the same, for it does not appear that the board of supervisors, in its purpose to make the change in the highway, acted otherwise than in good faith, and, ²⁸³ independent of the malicious intent, the situation would have been the same. It is possible that the case might be different, as to the two defendants, if it appeared that they engaged in the work with a malicious intent to injure the plaintiff, but it does not. The averment is, that "in directing and executing the work" they so acted. If these two defendants were legally justified or excused from liability because their employer is so justified or excused, we do not see how any particular state of their minds in doing the act could affect their liability. While at times malice might be an element tending to fix liability, its general effect is, in civil cases, to enhance, and not give rise to, actual damage. In *Anderson v. Park*, 57 Iowa, 69, where it is held that the petition did not state a cause of action against the officer, the fact that malice was pleaded was urged; and it is there said: "Where a judicial or other officer does no more than what the law requires him to do, it is immaterial, so far as his legal liability is concerned, in what state of mind he does it." We cite the language as bearing on the question of malice, alone, giving rise to damage where there are no other facts to justify it.

The ruling of the district court seems to us to be right, and the judgment is affirmed.

COUNTIES—LIABILITY FOR WRONGFUL ACT OR NEGLIGENCE OF OFFICERS OR AGENTS.—A county is not liable for the tortious acts of its officers or for acts clearly beyond their power: *County Commrs. v. Ball*, 23 Colo. 125; 55 Am. St. Rep. 117, and note. See, also, note to *Bailey v. Lawrence County*, 49 Am. St. Rep. 887; *Heigel v. Wichita County*, 84 Tex. 392; 81 Am. St. Rep. 63, and note.

ESTATE OF GOLDTHORP.

[91 Iowa, 336.]

WILLS—CONTEST—WITNESS—COMPETENCY.—Under a statute providing that no person interested in the event of an action "shall be examined as a witness in regard to any personal transaction or communication between such witness and a person at the commencement of such examination deceased," as against the personal representative or heir of the latter, a contestant of a will is not competent to testify to conversations between himself and the testator concerning the disposition of the latter's property; nor is such witness competent to give an opinion as to the sanity of the testator based on such conversations. He cannot claim to be a witness as to such facts on the ground that it cannot be known, until after the contest is decided, whether he is a legatee or interested party or not.

WILLS—CONTEST—EVIDENCE OF MENTAL CONDITION OF TESTATOR.—A person who is contesting a will is competent to testify to the mental condition of the testator in so far as his testimony is based upon his observation of the testator, his appearance, conduct, manner, and habits, not connected with personal transactions and communications between them; but, as to an opinion based upon such transactions and communications, he is incompetent to testify.

WILLS—UNDUE INFLUENCE.—OPINION EVIDENCE is not admissible to show that a testator acted under the control of a legatee in disposing of his property by will.

WILLS—CONTEST—EVIDENCE.—DECLARATIONS OF A LEGATEE made prior to the execution of a will, as to the disposition of his property to be made by the testator, are not admissible in evidence on a contest of such will.

WILLS—CONTEST—EVIDENCE—DECLARATIONS OF TESTATOR—UNDUE INFLUENCE.—Declarations made by a testator to a legatee, prior to the execution of his will, concerning the disposition to be made of his property, may be testified to by a contestant of the will who took no part in the conversation in which such declarations were made. Such evidence is admissible to show whether the will was procured by undue influence or not.

WILLS—EVIDENCE OF MENTAL CAPACITY.—A witness who, in testifying as to the mental capacity of a testator, has stated that the talk of the latter was disconnected, should be allowed to explain in what manner it was disconnected, in order to ascertain if the witness is competent as a nonexpert to give an opinion as to the testator's mental capacity.

WILLS—EVIDENCE OF UNDUE INFLUENCE.—In a contest of a will, declarations made by the testator, both before and after the execution of the will, as to his feeling toward the contestant, his reasons for not recognizing him in his will, the legatee's influence over him and the disposition to be made of his property, are admissible to show undue influence.

WILLS—EVIDENCE.—If the court holds that certain declarations made by the testator are admissible, provided counsel shall state that they relate to his will, and counsel so states, it is error to exclude such declarations.

W. J. Knight and R. W. Stewart, for the appellant.

Lyon & Lenehan, for the appellees.

³³⁷ KINNE, J. 1. Proponents filed for probate in the office of the clerk of the district court of Dubuque county, Iowa, an instrument purporting to be the last will and testament of Alice Goldthorp, deceased. By the terms of said will the testatrix gave and bequeathed unto her daughter, Sarah Jane Goldthorp, and to her son, John R. Goldthorp, in equal shares, all of her estate, real and personal, "to have and to hold the same forever." C. H. Eighmey was nominated in the will as ³³⁸ executor. Contestant, the appellant, filed exceptions to said instrument and its probate, upon the ground that it was not the will of deceased; that it was procured to be executed by fraud, coercion, and by undue influence. He also averred that, at the time said will was executed, the decedent did not have sufficient mental capacity to make a will. Upon the issues thus formed, a trial to a jury was had, which resulted in a verdict, rendered under the court's direction, that the instrument was the last will and testament of Alice Goldthorp, deceased.

2. Some eighty odd errors were assigned in this record, and nearly all arise upon the rulings of the court excluding evidence offered on behalf of contestant. We can only consider in detail the most important questions thus presented. Error is assigned upon the rulings of the court excluding the testimony of contestant as to conversations had with his mother, the decedent. The ground of objection to this proposed testimony was that the witness was incompetent, under the provisions of the code, section 3639, to give evidence touching such conversations. That section provides that "no party to any action or proceeding, nor any person interested in the event thereof, . . . shall be examined as a witness in regard to any personal transaction or communication between such witness and a person at the commencement of such examination deceased, . . . against the executor, administrator, heir at law, next of kin, assignee, legatee, devisee," etc. Appellant claims that the statute has no application to the proposed evidence, because: 1. Sarah and John are not legatees until this will is probated; 2. That prior to the probating of the will, it is not certain that they ever will be legatees, and hence the testimony cannot be said to be offered against ³³⁹ them as such: *Brown v. Bell*, 58 Mich. 58; 3. That as contestant was a nonexpert witness, and must state the facts upon which his opinion is based as to the unsoundness of testatrix's mind, it is competent evidence to show his qualification to express such opinion, and is not within the statute, unless contestant's opinion would come within the prohibition. In other

words, the first two propositions are based upon the thought that one named in a will as legatee is not such, within the meaning of this statute, until the probate of the will. We do not think the law should be so construed. If appellant's view is correct, then any party to an action or proceeding, or anyone interested therein, is a competent witness to testify against a legatee or devisee named in a will before it is probated, but not after its probate. We discover nothing justifying such an interpretation of the statute. Under such a construction, the application of the statute in such a case is made to depend upon the final result of the inquiry as to the validity of the will. When we consider the evil the legislature was attempting to remedy by the enactment of the law, it seems to us clear that the proposed construction is far-fetched and unnatural. It may probably be assumed that the legislature, in enacting this statute, had in mind the rule of law as to when a will takes effect. We have held that, no matter when a will is dated or published, it takes effect, or speaks, as it is sometimes said, from the time of the testator's death: *Lorieux v. Keller*, 5 Iowa, 201; 68 Am. Dec. 696; *Stephenson v. Stephenson*, 64 Iowa, 537; *Schouler on Wills*, sec. 486; and we have said that a legacy vested in the legatee at the time of the death of the testator (*Bowen v. Evans*, 70 Iowa, 368), and that the title of a devisee vests at death of the testator: *Otto v. Doty*, 61 Iowa, 26. The relation of legatee is created by the will, and under these holdings ³⁴⁰ becomes effective to vest title on the testator's death. Contestant was a person interested in the event of the litigation. He was proposing to testify as to personal conversations had with the deceased against one of the very parties whom the law protects against such testimony. We have no doubt that, so far as this contention was concerned, he was an incompetent witness. The case of *Brown v. Bell*, 58 Mich. 58, was decided under the statute of Michigan, which is materially different from our own.

3. Nor do we think appellant's third proposition can be sustained. The theory of that claim is, that as the nonexpert witness must show to the court that he is qualified to give an opinion as to the mental condition of the decedent before he will be permitted to express his opinion, and as testimony tending to show such qualification is preliminary only to the main issue, he should be permitted to testify to conversations had with decedent. It should be stated here that the evidence shows that the opinion which the contestant formed as to decedent's mental condition was largely, if not wholly, based upon these conversa-

tions. It is said that an opinion is not a "transaction or communication," and hence is admissible. Though not in and of itself a "transaction or communication" had with decedent, yet, if it is in fact but the result, the outgrowth, and the conclusion arrived at from a consideration of prohibited testimony, it is not easy to see upon what ground, in view of the provisions of the statute, the qualification can be shown to give the opinion, or the opinion itself be stated, under the circumstances herein disclosed. It is said that the decedent, if living, could not dispute the testimony of contestant as to his opinion of her soundness of mind; that the testimony proposed is for the purpose of proving a fact distinct from anything said or done, independent ³⁴¹ of any information received from the language employed. The position does not seem to us tenable. The opinion, in such a case, where it is based upon the conversations, is dependent upon the facts from which it is deduced—the conversations. Without the conversations there could be no ground for the opinion. How, then, can the opinion be said to be a fact distinct from and independent of the conversations? Now, clearly, if decedent was alive, she could by her testimony controvert and gainsay the conversations. She might testify that no conversations took place. Where, then, under the facts shown in this record, would be the basis for the opinion? Counsel, in support of their claim, cite *Marietta v. Marietta*, 90 Iowa, 201; *Sankey v. Cook*, 82 Iowa, 125, and *Dysart v. Furrow*, 90 Iowa, 59. We need not discuss these cases. They hold that testifying to one's handwriting, when such testimony is based upon one's general knowledge, and not on the fact of seeing decedent write the signature in controversy, is not testifying to a personal transaction; and that one may make preliminary proof as to his books of account against an administrator. In such cases, the testimony is not based upon conversations or transactions with the decedent. This case is, as we have seen, very different in its facts in that respect. If, as we have seen, contestant is not a competent witness to testify as to conversations had with the decedent, it follows he cannot testify to an opinion based upon testimony as to which the statute makes him an incompetent witness: See *Denning v. Butcher*, 91 Iowa, 425.

4. Complaint is made that the court erred in excluding evidence of contestant as to decedent's mental condition, which was based upon observation ³⁴² and facts, independent of any conversation or communication had with decedent. It is the law in this state that facts ascertainable from observation alone are

not considered personal transactions. That contestant was a competent witness to testify to the mental condition of the decedent, in so far as his testimony was based upon his observation of decedent, her appearance, conduct, manner, and habits, there can be no doubt: *Severin v. Zack*, 55 Iowa, 28; *Parsons v. Parsons*, 66 Iowa, 754; *Meeker v. Meeker*, 74 Iowa, 352; 7 Am. St. Rep. 489; *Sim v. Russell*, 90 Iowa, 656; *Denning v. Butcher*, 91 Iowa, 425. Before, however, he could give his opinion, he must testify to such facts as would show his competency to express an opinion: *State v. Stickley*, 41 Iowa, 236; *Parsons v. Parsons*, 66 Iowa, 759; *Denning v. Butcher*, 91 Iowa, 425. In the case last cited we held that, after the nonexpert witness stated the facts upon which or from which he proposed to give his opinion, it was for the trial court to say, in the exercise of sound legal discretion, whether the witness had shown himself qualified to give an opinion. In view of these rules, which are not disputed, was there error in the court's ruling? It may be proper to set out a few of the questions ruled upon, viz: 1. "Now, I will ask you as to anything particular about her mind as to being strong or feeble, what you noticed at the time of your father's death." 2. "Now, beginning at the time of your father's death, I will ask you whether you noticed anything about her that indicated weakness of her mind. If so, what was it?" 3. "Did you notice any strange actions on her part about that time?" 4. "Now, as to her mind." A. "It seemed weak." This answer was stricken out. Witness testified that "she would grow more childish and weak-minded." The words "weak-minded" were stricken out. It is difficult, if not impossible, to ²⁴³ say in every case what is a fact and what an opinion: *Yahn v. Ottumwa*, 60 Iowa, 429. If, from observation alone, the witness noticed anything about the decedent which indicated the condition of her mind as to strength or feebleness, we do not see why it does not call for a fact, and not an opinion. The forms of the questions 1 and 2 call for what the witness saw which indicated the condition of the decedent's mind. This did not call for a personal transaction or communication. Such evidence, being as to a fact, does not require that a foundation be laid preliminary to its introduction. The questions did not call for an opinion as to the soundness or unsoundness of the mind of the testator. As is said in *Smith v. Hickenbottom*, 57 Iowa, 740: "Weakness is not necessarily unsoundness." Again in *Parsons v. Parsons*, 66 Iowa, 754, it was held that the following answer, "Well, his mind was weak from this on, and he was childish all

summer," was not vulnerable to a motion to strike, because relating to a personal transaction or communication, and that such evidence related to a fact. And in the same case it is said: "We think that evidence that a person acted strangely or in a childish manner are facts, and may be testified to by anyone." The witness might testify from what he saw that decedent was weak physically, and in principle we see no difference between such an inquiry, whether it relates to the physical or mental organization, so long as it calls for facts ascertainable by observation alone. In view of the authorities we have cited, we think the witness should have been permitted to answer these questions. So, also, the court erred in striking out the answers above set forth. Later on in the examination, the witness was asked to state his opinion as to whether decedent was weak-minded. This opinion was properly excluded, as the question did not limit the ³⁴⁴ opinion to what he had observed, but embraced "what he knew," which might well include what he had ascertained from personal transactions and communications.

5. Complaint is made as to rulings excluding the testimony of contestant as to the control which Sarah exercised over the decedent. We think the rulings were proper. The question, as framed, called for the conclusion or opinion of the witness, not for facts. In effect, they called for the opinion of the witness as to whether the decedent was acting under the control of Sarah.

6. It is urged that the court erred in excluding evidence of contestant as to conversations had between proponents concerning decedent's property. These conversations occurred before the execution of the will. Some of these questions did not indicate that the matter called for was relevant or material to the issue, and hence, in the absence of anything disclosing that fact, the court did not err in excluding them. As to the declarations and conversations made prior to the execution of the will, we think they were inadmissible. The declarants are not parties to this record: See *In re Ames*, 51 Iowa, 596; *Parsons v. Parsons*, 66 Iowa, 759; *Dye v. Young*, 55 Iowa, 433.

7. Complaint is made of the exclusion of contestant's evidence as to what he heard decedent say to the proponents as to her desire touching the distribution of her estate. This appears to have related to a time prior to the execution of the will. The witness, not having taken part in the conversation, was not prohibited from testifying to such facts. These declarations ³⁴⁵ appear to have been made about five months prior to the execu-

tion of the will. These declarations were admissible, not as establishing undue influence, but as touching the mental capacity of the testator, and bearing on whether the will was procured by undue influence: *Bates v. Bates*, 27 Iowa, 114; 1 Am. Rep. 260; *Bever v. Spangler*, 93 Iowa, 576. That is, whether the disposition of property as made by the will was induced by undue influence: *Muir v. Miller*, 72 Iowa, 590; *In re Last Will of Hollingsworth*, 58 Iowa, 527; *Stephenson v. Stephenson*, 62 Iowa, 165. Such testimony in and of itself may have no great weight, but it is proper to be considered in connection with other evidence upon the question of undue influence.

8. Witness Simpson should have been permitted to testify in what manner the decedent's conversation was disconnected. Such evidence was proper as tending to show the qualification of witness as a nonexpert to give an opinion. It was material as bearing upon the question of mental capacity. Several witnesses who were in no wise interested in the event of the proceedings were asked as to statements made both before and after the execution of the will. Some of the declarations called for were made two years prior to the execution of the will; others as long as seven years after it was made; and still others at intervals between these times; and some of them within a few weeks of the time the will was made. They were touching her feelings toward appellant, as to how she wanted to leave her property when she died, what disposition she intended to make of her property, as to remembering appellant in her will, as to her inability to change her will because of the influence of John and Sarah, with relation to what she said about doing better by appellant if Sarah and John would let her, and why she had ³⁴⁶ not done better by him in her will, and not recognized appellant in it. These and many other similar questions were ruled out as being irrelevant, immaterial, and too remote from the time of the execution of the will. As to the declarations made prior to the execution of the will, they are, we think, admissible in connection with other testimony upon the question of undue influence: *Stephenson v. Stephenson*, 62 Iowa, 165; *Muir v. Miller*, 72 Iowa, 590; *Bates v. Bates*, 27 Iowa, 114; 1 Am. Rep. 260; *Dye v. Young*, 55 Iowa, 435; *Canada's Appeal*, 47 Conn. 463. The proposed evidence of subsequent declarations was also admissible. Such declarations come within the rule announced in *Stephenson v. Stephenson*, 62 Iowa, 166; *Bates v. Bates*, 27 Iowa,

110; 1 Am. Rep. 260; In re Last Will of Hollingsworth, 58 Iowa, 528; Parsons v. Parsons, 66 Iowa, 754.

9. Witness Stewart was asked what she heard decedent say about seven years after the execution of the will regarding the contestant. This evidence was objected to as immaterial, incompetent, and not tending to prove mental condition at the time of making the will, or that any influence had been exercised upon decedent. The court announced he sustained the objection, unless counsel states he proposes to show declarations of deceased concerning her will; whereupon counsel so stated, and the court sustained the objection. We see no reason for this ruling. The court had, in effect, said the evidence was proper if it related to declarations of deceased concerning her will, and had invited counsel to state whether they did relate thereto; and, counsel having brought themselves within the ruling of the court, the testimony should have been received.

10. At the close of the evidence, the court, on the motion of proponents, directed a verdict in support of the will. We are not required to determine whether ³⁴⁷ this action was proper or not. It is possible in the then state of the record that no case had been made warranting the court in submitting it to the jury. However that may be, no one can say what sort of a case appellant would have made had he been permitted to introduce the evidence offered and improperly excluded. By the rulings he was not only prevented from introducing the particular evidence offered, but from following it with like competent evidence. We think the errors were material and clearly prejudicial. It must be understood that we have not specifically mentioned every case of error, but we have, we think, sufficiently indicated our views upon the main points raised so that the rulings here made may be applied to questions not treated of.

We may say that from the whole record we are impressed with the conviction that the trial court was unduly technical in many of its rulings.

Reversed.

WILLS—CONTEST—COMPETENCY OF WITNESSES.—The heirs of a deceased person are competent witnesses to disprove a will by which they would take a greater share than under the statute of distributions, but they would be incompetent to support it: *Roberts v. Trawick*, 17 Ala. 55; 32 Am. Dec. 164. See *Lawyer v. Smith*, 8 Mich. 411; 77 Am. Dec. 460. A legatee under a prior will is a competent witness against a subsequent will in contest: *Titlow v. Titlow*, 54 Pa. St. 216; 93 Am. Dec. 691.

WILLS—UNDUE INFLUENCE—ADMISSIBILITY OF EVIDENCE.—It is not possible to specify or describe all the evidence which may properly be received either to prove or disprove the existence of undue influence: Monographic note to *In re Hess' Will*, 81 Am. St. Rep. 686-691, discussing the subject at length. See, also, *Haines v. Hayden*, 95 Mich. 332; 35 Am. St. Rep. 506; *Goodbar v. Lidikey*, 136 Ind. 1; 43 Am. St. Rep. 296.

WILLS—TESTAMENTARY INCAPACITY—EVIDENCE—DECLARATIONS OF TESTATOR.—Declarations of a testator or donor are admissible in evidence, not for the purpose of establishing the truth of his statements, but merely to show the condition of his mind; and they are admissible for this latter purpose only when they are sufficiently near in point of time to be of some value in determining his mental condition when he did some act which is assailed for his want of capacity: *Lane v. Moore*, 151 Mass. 87; 21 Am. St. Rep. 430, and note; *Meeker v. Meeker*, 74 Iowa, 352; 7 Am. St. Rep. 489, and note. See *Thompson v. Ish*, 99 Mo. 160; 17 Am. St. Rep. 552.

FOLLIS v. UNITED STATES MUTUAL ACCIDENT ASSOCIATION.

[94 Iowa, 436.]

INSURANCE—LIFE AND ACCIDENT—CONSTRUCTION OF POLICY.—If a policy of life and accident insurance promises to pay a certain sum in case of death, "and that the payment of the various sums of indemnity herein provided is conditioned upon the same being realized from assessments upon the members of the association," while its by-laws provide for an assessment to be made "to pay losses in the event of there being no funds at hand to meet them," the beneficiary, without filing a bill in equity to compel the levy of an assessment, may sue at law to recover the amount of the policy, and need not allege nor prove that there are funds in the treasury, nor that any assessment has been levied or moneys realized to pay the claim.

INSURANCE — LIFE AND ACCIDENT — EXCEPTED CAUSES—BURDEN OF PROOF.—If an accident insurance policy excludes liability for injury to the insured caused by his voluntary exposure to unnecessary danger, the burden of proof is upon the insurer to show that the injury is within the excepted cause.

INSURANCE—ACCIDENT—EXPOSURE TO UNNECESSARY DANGER.—Within the meaning of an accident insurance policy exempting the insurer from liability to the insured, caused by his voluntarily exposing himself to unnecessary danger, it is such exposure, as matter of law, for the insured to attempt, on a dark night, to cross a railroad trestle on the ties, and on that side of the trestle having no rail, when the opposite side of the trestle is provided with a rail and plankwalk and is open for use.

Kennedy & Kennedy, and Peet, Smith & Murray, for the appellant.

T. F. Griffin and Lynn, Sullivan & Foley, for the appellee.

436 DEFMER, J. The policy in suit provides that "if death shall result from such injuries [external, violent, and accidental] alone, and within ninety days, the association will pay five thou-

sand dollars to Mary A. Follis [his wife]." Among other conditions appearing upon it is this: "The payment of the various sums of indemnity herein provided is conditioned, pursuant to chapter 175 of the Laws of 1883 of state of New York, upon the same being realized from assessments (premium calls) upon the members of the association. Payment in case of loss of one or both hands, feet, or eyes, or for permanent total disability, shall immediately terminate membership and this insurance." We are not advised as to what is contained in chapter 175 of the Laws of 1883 of the state of New York. The by-laws of the defendant company provide for an assessment to be made by ⁴³⁷ the company to pay losses in the event of there being no funds at hand with which to meet them. It is insisted on behalf of appellant that the promise to pay in this case is conditional upon the same being realized from assessments upon the members of the association, and that as there is neither allegation nor proof of any funds in the treasury of the company, nor of any assessment having been levied or moneys realized to pay the claim, plaintiff cannot recover more than nominal damages; her remedy being in equity, to compel the levy of an assessment. Counsel cite, to sustain them, *Bailey v. Mutual Ben. Assn.*, 71 Iowa, 690, and kindred cases. These cases are not applicable, for the reason that in each of them the obligation of the company was to pay the net proceeds of an assessment, not to exceed the amount called for by the certificate, to the beneficiary. Here the promise is to pay a definite amount, which is in no manner dependent upon or limited by the assessment. True, an assessment is provided for, but this is simply the method the company, which is a mutual one, has of securing the fund. The case is more nearly like *Harl v. Pottawattamie etc. Ins. Co.*, 74 Iowa, 39. See, also, *United States etc. Assn. v. Barry*, 131 U. S. 100; *Bacon on Benefit Societies*, sec. 453; *Niblack on Mutual Benefit Societies*, secs. 384-386. We think the action was properly brought at law.

2. One of the conditions of the policy is, that it does not cover or extend to accidental injuries or death happening while the insured is under the influence of intoxicating liquors, or in consequence thereof. It is insisted that the evidence shows that the deceased was under the influence of intoxicating liquor when he received the injuries which caused his death, and that he walked off the railway bridge in consequence of his being intoxicated. There was a sharp conflict in the evidence on this ques-

tion, and it was submitted to the ⁴³⁸ jury under proper instructions. The jury found that the insured was not intoxicated, and with this finding we cannot interfere.

3. Another condition of the policy is, that it shall not extend to or cover death caused directly or indirectly, wholly or in part, by voluntary exposure to unnecessary danger. It is contended that deceased went upon the bridge, which was private property of the railway company, on a dark night, knowing it to be a dangerous place, and that he fell therefrom, struck his head so that he was stunned, and, falling into the water of the creek, was suffocated and drowned before he regained consciousness. The evidence shows that the bridge underneath which the deceased was found is an ordinary pile trestle-work railroad bridge, about fifteen feet high and something like one hundred and fifty feet long and thirty feet in breadth. The creek which it spans is from fifteen to twenty feet wide. On the north side of the bridge is a walk built originally as a sort of platform on which passengers from the trains might alight. This platform or walk is about five feet wide, and extends the entire length of the bridge. On the north side of the walk is a fence railing to prevent pedestrians from falling off. South of the walk are the two railway tracks, and between them a narrow plank for the railroad employes to walk upon. From the south rail to the end of the ties on the bridge is about ten or eleven feet. The ties here are about ten inches apart, and they are uncovered. On the south side, at the extreme west end, there is a little platform, about twelve feet long, for switchmen to stand upon. It has a fence around it, so that employes would not walk off it at night. There was no approach to this platform from the east end, and the ties were open to the east and north of it. The ⁴³⁹ north side of the bridge was extensively used by footmen who desired to cross the creek. Follis was last seen about 9 o'clock in the evening of the day before his body was found in the creek. His condition is a matter of some dispute, but it is evident that about this time he started to his home, which was across the creek from the place where he was last seen, and that while crossing the bridge he in some manner fell therefrom, and received the injuries which resulted in his death. The body was found near the west end of the bridge, and almost directly under the south end of the ties. The money and other valuables he had on his person, were not disturbed. There was quite a large cut or bruise on the forehead, and it is supposed he received this wound in his face

from the bridge. The question then is, Does it appear from these facts that the deceased met his death while voluntarily exposing himself to unnecessary danger? It is well to notice that the clause of the policy quoted does not cover voluntary exposure to necessary danger, or involuntary exposure to unnecessary danger, and it evidently means something more than contributory negligence or the want of ordinary care on the part of the assured. The policy was no doubt intended to cover accidents, although the insured may have been guilty of negligence which proximately contributed to his injury. To render one guilty of a voluntary exposure to danger, he must have intentionally done some act which reasonable and ordinary prudence would pronounce dangerous. The burden was upon the defendant to show that the deceased received his injuries while or because of his voluntary exposure to unnecessary danger: *Jones v. United States etc. Assn.*, 92 Iowa, 654; *Freeman v. Traveller's Ins. Co.*, 144 Mass. 572. It is shown by the testimony that the bridge in question was much frequented by foot passengers, and ⁴⁴⁰ it appears to us that the north side was reasonably safe for use as a bridge over the creek which it spans. Indeed, in the condition it was in, it was as safe as any ordinary bridge, except that it had no guard rail on the south side. We do not think it should be held, as a matter of law, that the deceased exposed himself to danger by taking the bridge in going to his home. Moreover, it is not shown that there was any other bridge by which he might have crossed the creek. There is nothing in the record to show that the exposure, whatever it may have been, was not necessary. The jury was justified in finding that deceased was not unnecessarily exposing himself to danger in attempting to cross the bridge. It is insisted, however, that the insured must have attempted to walk across the bridge on the ties on the south side, where there was no walk or planking, and that in so doing he brought himself within the condition of the policy relied upon. It seems to us this conclusion is inevitable. That he fell from the south side of the bridge, and at a point at least twenty-five feet from the nearest end, must be conceded. That it is dangerous to attempt to cross a bridge fifteen feet high, upon ties from ten to twelve inches apart, on a dark night, is a proposition so plain as to be indisputable. And, while it may have been necessary for the deceased to use the bridge to reach his house, it was entirely unnecessary for him to attempt to cross it where there was no walk or planking of any kind. It cannot well be said that he did not know he was upon the ties, and not upon the

walk, and that the danger was unknown to him, for he had passed on to the bridge at least twenty-five feet, and must have known he was upon the ties. The jury found that the insured was not intoxicated, and his choice of walk must then have been voluntary. If it can be said that a presumption exists that he did not ⁴⁴¹ voluntarily put his life in jeopardy, because of the known instincts which prompt everyone to preserve his own life, yet, as against this, we have the presumption, aided to some extent by the finding of the jury, that the deceased was in his right mind, and was capable of controlling his actions and directing his course. His act, then, is presumed to have been voluntary; and, from the other circumstances in the case, it is clear that he must have been walking in a dangerous place when he met with the accident. It seems to us that there is no escape from the conclusion that the assured was voluntarily exposing himself to unnecessary danger, in attempting to cross the bridge, on the south side, at the time he did. The danger was plain, the exposure to it unnecessary and voluntary, and death resulted in consequence thereof: *Tuttle v. Travellers' Ins. Co.*, 134 Mass. 175; 45 Am. Rep. 316; *Travellers' Ins. Co. v. Jones*, 80 Ga. 541; 12 Am. St. Rep. 270; *Shaffer v. Travellers' Ins. Co.* (Ill. Sup. Oct. 31, 1889), 22 N. E. Rep. 589; *Williams v. United States etc. Assn.*, 133 N. Y. 366; *Lovell v. Insurance Co.*, 5 Ins. L. J. 559; 3 Ins. L. J. 877. There should have been a verdict for defendant, on the evidence adduced.

Reversed.

INSURANCE—LIFE AND ACCIDENT—BURDEN OF PROOF.—Under a policy insuring against death from such violent and accidental injuries as shall externally be visible on the body, and which alone cause death, evidence that the insured was found dead and mangled on a railroad track establishes a *prima facie* case, and casts the burden of proof upon the insurer to show that death resulted from a violation of some conditions in the policy specially pleaded in defense: *Mendows v. Pacific Mut. Life Ins. Co.*, 129 Mo. 76; 50 Am. St. Rep. 427, and extended note.

INSURANCE—ACCIDENT—EXPOSURE TO UNNECESSARY DANGER.—A condition exempting the insurer from liability for injuries suffered by the assured while walking or being on a railway bridge or roadbeds, does not extend to injuries suffered by him when his business calls him to a track or crossing for a lawful purpose, unless it was in a time of danger, and he willfully exposed himself to such danger: *De Loy v. Traveller's Ins. Co.*, 171 Pa. St. 1; 50 Am. St. Rep. 787, and note.

INSURANCE—MUTUAL LIFE AND ACCIDENT—ACTIONS AGAINST COMPANIES.—If a mutual assurance association, after due notice of death, neglects to make the call necessary to produce the death fund required to cancel a benefit certificate, an action may

be sustained against it for damages for breach of its contract of insurance, without first resorting to proceedings in equity to compel the levying of a call or assessment: Monographic note to Lake v. Minnesota etc. Assn., 52 Am. St. Rep. 577.

SEIFFERT AND WIESE LUMBER CO. v. HARTWELL.

[91 Iowa, 573.]

APPELLATE PRACTICE—ORDER INVOLVING MERITS.—

An order overruling a motion to strike out matter setting up an essential element of the validity of a mortgage sued on, is "an immediate order involving the merits," and may be appealed from.

HOMESTEADS—VOID MORTGAGE OF—RATIFICATION.

Although a mortgage upon a homestead is signed and acknowledged by both husband and wife, the failure of the husband to join in the granting part thereof renders it void, under a statute requiring "the husband and wife to concur in and sign the same joint instrument" conveying or encumbering the homestead, and such mortgage is not ratified nor rendered valid as between the parties to it, by a recital in a second mortgage of the same property, duly executed, that it is "subject" to such first and void mortgage.

Robinson & Johns and A. B. Johns, for the appellants.

Benjamin & Preston, for the appellee.

577 ROBINSON, J. The notes described in the petition were given by the appellants, and are dated December 22, 1890. One was for one hundred and eighty-one dollars and seventy-five cents, payable one year after its date, and the other was for one hundred and eighty-one dollars and eighty cents, payable eighteen months after its date. They are alleged to be wholly unpaid, and no question is made in regard to either of them. To secure their payment, a mortgage dated December 26, 1890, was given on the homestead of the appellants, which consisted of two lots in Arnold's addition to Oakland, in Pottawattamie county. It is not shown in which of the appellants the title to the lots was vested. The mortgage is in an ordinary form, and is signed and acknowledged by both of the appellants; but the name of the wife alone appears in the body of **578** the instrument, and it is drawn throughout as though it was to be executed only by her. The petition alleges that, after the mortgage described was executed, the appellants executed to the defendants, David Bradley & Co., a second mortgage on their homestead, in the usual form, which contained a provision of which the following is a copy: "Subject to a mortgage given to Seiffert & Wiese Lumber Co., dated December 26, 1890, due in one and two years, for \$365.55." It is further alleged that by the execution of that

mortgage the one to the plaintiff was recognized by the appellants and by David Bradley & Co. to be valid. The petition also alleges that the mortgage to the plaintiff was executed by virtue of a verbal agreement which provided that a valid and binding mortgage should be executed to the plaintiff on the homestead of the appellants, but that, by mistake of the scrivener, the name of the husband was not inserted in the body of the instrument, where it was required to be by the agreement. A reformation of the instrument, to make it conform to the agreement and intent of the parties, is asked. The averments of the petition on which a reformation was demanded were, on the motion of the defendants, stricken out, and no question in regard to the reformation is made in this court, and no further consideration will be given to that matter. The part of the motion which was overruled sought to have stricken from the petition all those portions which referred to and set out the mortgage to the plaintiff, and which averred a recognition of it by the execution of the mortgage to David Bradley & Co.

1. The first question presented for our determination is, whether the order of the district court, so far as it overruled the motion to strike, is one from which an appeal may be taken. The appellee contends that it is not, and that the appeal should be dismissed. ⁵⁷⁰ Section 3164 of the code provides that an appeal may be taken to this court from various orders, and, among others, from "an intermediate order involving the merits and materially affecting the final decision." This provision was construed in *Specht v. Spangenberg*, 70 Iowa, 489, and held not to apply to a ruling on a motion to strike out, as irrelevant, a part of a petition not designed to show a distinct cause of action. The motion under consideration in that case asked to have stricken from a petition matter pleaded, not as an independent cause of action, but in aggravation of damages. The motion in this case denied the right of the plaintiff to any relief on account of the mortgage in suit. To that extent the motion was, in effect, a demurrer. It did not assail the right of the plaintiff to recover on the notes, and no objection to them was made. The motion sought all the relief which the appellants demanded in the case, and the ruling on it materially affected the final decision. This is shown by a consideration of the rights claimed by the plaintiff. Had the motion been sustained, the plaintiff would have been deprived of an important part of the relief it demanded—perhaps of all which would give the notes value. It

is clear that the rulings involved the merits of the controversy, and affected materially the final decision: *Bicklin v. Kendall*, 72 Iowa, 490. We conclude that the appeal cannot be dismissed, and that the case must be determined on the questions presented by the ruling on the motion to strike.

2. The appellants contend: 1. That the mortgage to the plaintiff is absolutely void, and that they could not, as a matter of law, have confirmed it; 2. That if they could have confirmed it, the facts pleaded do not show a confirmation.

Section 1990 of the code, relating to homesteads, provides that "a conveyance or encumbrance by the ⁵⁸⁰ owner is of no validity unless the husband and wife, if the owner is married, concur in and sign the same joint instrument." Under this provision, the failure of the husband to join in the granting part of the mortgage was fatal to its validity, and it must be treated as void, unless it has been made valid by ratification: *Wilson v. Christopherson*, 53 Iowa, 481; *Sharp v. Bailey*, 14 Iowa, 387; 81 Am. Dec. 489; *Eisenstadt v. Cramer*, 55 Iowa, 753.

The appellants contend that "confirmation" applies to that by which what was before voidable is made valid, as, where one makes valid a voidable contract of his own, which he might have repudiated, while ratification applies to the act of another, in the nature of an act of agency. That such is the primary use of the words is true, but they are often used interchangeably, as synonyms. It was held in *Stinson v. Richardson*, 44 Iowa, 375, of the right of the wife in a homestead, the title to which was vested in the husband by a bond for a deed, that she could not verbally consent to an assignment of the bond made by the husband alone, and thereby estop herself to question it, and that nothing she could say or do, short of concurring in and signing the same joint instrument with her husband, would give the conveyance any validity. In the case of *Spafford v. Warren*, 47 Iowa, 47, it appeared that the wife had joined with her husband in executing an instrument which was designed to be a mortgage of their homestead, in which the blanks for the name of the grantee, and for the description of the property, were left unfilled. Afterward, in the absence of the wife, the husband discovered that the instrument was in form an absolute deed; but he filled the blanks, and delivered the instrument to Warren. The latter had no knowledge of the circumstances under which the deed had been executed, excepting that the name of the grantee had not been inserted until after its execution. ⁵⁸¹ It

was held that the instrument was joint, concurred in and signed by both husband and wife, and that it was within their power to ratify it and make it valid. It was held that the wife had ratified the deed by acts and a course of conduct which recognized the deed as valid, and which were of a nature to create an estoppel. The conclusion reached was held not to be in conflict with the case of *Stinson v. Richardson*, 44 Iowa, 375. This case is distinguishable from that of *Spafford v. Warren*, 47 Iowa, 47, in that the instrument involved in this case did not purport to be the mortgage of the husband. His name did not appear in it, and no ratification could give it validity, unless by a joint instrument concurred in and signed by both the husband and wife. That an instrument purporting to convey a homestead, which is not merely voidable, but is absolutely void, may be made valid by ratification, was held in *Spafford v. Warren*, 47 Iowa, 47, and the same doctrine was recognized in *Bruner v. Bateman*, 66 Iowa, 488.

This makes it necessary to determine the effect of the mortgage to David Bradley & Co. as a ratification of the void mortgage to the plaintiff. The reference to the latter contained in the former is not in all respects accurate, but is unmistakable. The errors relate to the amount of the notes, and the length of time one of them had to run, and appear to be unimportant. Nothing is claimed on account of them by either party. The mortgage to David Bradley & Co. is on the homestead of the appellants, and was concurred in and signed by both the appellants. It contained an express recognition of the mortgage to the plaintiff, and the interest conveyed was subject to that mortgage, but the effect which should be given to it was not specified. "Where land is purchased of a mortgagor subject to a mortgage supposed to be valid, whether it is so or not, the mortgaged land becomes the ⁵⁸² primary fund for the discharge of the mortgage debt. The theory is, that the amount of the mortgage is deducted from the purchase price, and it would be inequitable to allow the purchaser to take advantage of the invalidity of the mortgage, and cast the debt upon the vendor, who had virtually furnished the consideration for its discharge. Nor is it necessary, in order that the land shall stand primarily charged with the payment of the mortgage debt, that the purchaser of the mortgagor should have assumed its payment. It is sufficient if the land was purchased subject to the mortgage, without any personal liability being assumed by the purchaser": *Fuller v. Hunt*, 48 Iowa, 167. When

real estate is sold subject to a mortgage thereon, the amount of which is deducted from the purchase price, the purchaser cannot deny the validity of the mortgage: *Myers v. Bowers*, 70 Iowa, 95. Contracts by which the purchaser of land assumes the payment of a mortgage thereon are primarily for the benefit of the mortgagor, and may be released before they are accepted by the mortgagee: *Gilbert v. Sanderson*, 56 Iowa, 349; 41 Am. Rep. 103; *Cohrt v. Kock*, 56 Iowa, 661. But the purchaser does not become personally liable for the payment of the mortgage, unless by special agreement. The purchasing of the premises subject to the mortgage, without more, cannot be given the effect of such an agreement: *Johnson v. Monell*, 13 Iowa, 303; *Aufricht v. Northrup*, 20 Iowa, 61; *Rice v. Hulbert*, 67 Iowa, 724. In this case, David Bradley & Co. did not become the absolute owners of the premises, but merely of a mortgage interest therein, and they did not assume the payment of a prior mortgage. As their interest was acquired subject to that mortgage, it may be they would not be permitted to question its validity, especially as against the interests of the mortgagor; but this case does not, in any other respect, come within the ⁵³³ rule or the reason of any of the cases cited. In this case it is the owners of the homestead who are contesting the validity of the first mortgage. If it is defeated, the benefit will inure to them, and not to a grantee who has in effect, if not in terms, agreed that it shall be treated as valid. The important question is, Did the second mortgage so far ratify the first as to make it valid between the appellee and the appellants? It was said in *Haynes v. Seachrest*, 13 Iowa, 455, that "a recognition which shall have the effect of making valid a deed which, but for such ratification, would be ineffectual to pass the title, as against the party or subsequent encumbrancers, should be clear and express, or be implied from circumstances equally clear and undisputed." In this case there is no doubt as to what the alleged ratification is, for it is all contained in the part of the second mortgage quoted. Is it clear that it was intended to make valid in favor of the plaintiff what was before void? We think not. It does not purport to be for the benefit of the plaintiff. It does not undertake to cure any defect in this mortgage. Evidently, it was not designed to accomplish any purpose of that character. The plaintiff has not been prejudiced or misled by the giving of the second mortgage, and there is not an element of estoppel in the facts disclosed by the pleadings. In view of the care with which the stat-

ute guards against an alienation of the homestead, excepting by the free and concurrent acts of the husband and wife; we are of the opinion that it would be contrary to both its letter and spirit to hold that the second of the two instruments in question made of the first one a valid mortgage: See *Sharp v. Bailey*, 14 Iowa, 387; 81 Am. Dec. 489. The controlling facts in this case are materially different, in legal effect, from those which determined that of *Spafford v. Warren*, 47 Iowa, 47. In that case both the husband and the wife joined ⁵⁸⁴ in the granting part of the deed, which was given to a person ignorant of the fact that the description of the premises was not inserted when it was executed, and of the mistake as to its character. It was held that the husband and wife did in fact concur in and sign the same joint instrument. The wife supposed that it was a mortgage, but after she had discovered her mistake, and had been fully informed as to her rights, she surrendered the property voluntarily, without protest, made no objection to the title of the grantee when he offered, in her presence, to sell it, and permitted him to remain in quiet possession of it, and to make improvements thereon, and to discharge encumbrances upon it, without a word of warning. In that case an instrument was executed in a manner required by statute, which purported to convey the homestead, in all parts of which both the husband and wife joined. In this case no instrument of that character has been executed. We conclude that the district court erred in overruling so much of the motion to strike as is involved in this appeal, and its order in that respect is reversed.

Deemer, J., takes no part.

APPEAL—WHAT ORDERS ARE APPEALABLE.—Judgments or orders from which an appeal will lie are those which either terminate the action itself, or operate to divest some right in such a manner as to put it out of the power of the court making the order to place the parties in their original condition after the expiration of the term: *Harrison v. Lebanon Waterworks*, 91 Ky. 255; 34 Am. St. Rep. 180, and note. See, also, note to *Holloway v. Holloway*, 10 Am. St. Rep. 349.

HOMESTEADS—CONVEYANCE OR MORTGAGE OF—ASSENT OF WIFE.—A conveyance of a homestead in which the husband alone appears as grantor, but containing a clause declaring that the wife releases to the grantee all her right or possibility of dower, the deed being signed and acknowledged by both spouses, cannot be regarded as executed by the wife for any purpose except to release her dower, and is therefore inoperative as against the homestead rights either of herself or of her husband: *Pipkin v. Williams*, 57 Ark. 242; 38 Am. St. Rep. 241, and note. See extended note to *Alt v. Banholzer*, 12 Am. St. Rep. 683; *Howell v. McCrie*, 36 Kan. 636; 59 Am. Rep. 584.

KISTERSON v. TATE.

[94 IOWA, 665.]

JUDGMENTS—LIEN OF ON AFTER-ACQUIRED PROPERTY—PRIORITIES.—If separate judgments in favor of different persons are obtained at different times, against the same judgment debtor, they all become liens at the same instant upon property afterward acquired by him, and neither judgment lien has any priority over the other.

W. Eaton, W. S. Lewis, and C. E. Dean, for the appellant.

S. Gilliland, for the appellee.

665 KINNE, J. 1. May 19, 1885, one Dilehay recovered a judgment against Samuel Dalton. May 27, 1885, one Webb obtained a judgment against Dalton. August 6, 1885, Dalton obtained title to the southeast quarter of section 4, in township 70, range 42 west of the fifth post meridian. December 12, 1891, Webb caused an execution to issue upon his judgment, and sold the land above described thereunder. Webb assigned his certificate of sale to plaintiff, who, in January, 1893, obtained a sheriff's deed to said land. After the levy of the execution on the Webb judgment, and on August 9, 1892, Dilehay caused an execution to be issued on his judgment and levied upon said real estate, and the same was sold thereunder, and a certificate of sale 666 issued to Dilehay. It seems that in 1889, and after the levy on the land under the Webb execution, Dalton, the owner of the land, enjoined the sale thereunder, and on appeal to this court the decree below was reversed, and the land sold thereunder, as heretofore stated. Plaintiff in this action claims that as the deed under which he claims was executed in pursuance of a sale had under an execution issued upon the Webb judgment, which was levied upon the land prior to the levy of the execution on the Dilehay judgment, that priority was thereby obtained. He asks that the defendant sheriff be enjoined from executing a deed to said property. To the petition setting forth the above facts defendant demurred. The demurrer was overruled, and judgment and decree entered in favor of plaintiff. Defendant appeals.

2. Dilehay recovered a judgment against Dalton. Thereafter plaintiff's assignor recovered a judgment against Dalton. Several months after the recovery of both of said judgments, Dalton became the owner of forty acres of land subject to execution. Plaintiff's assignor caused an execution to issue on his judgment, and levied upon and sold said land. Some time afterward, Dile-

hay caused an execution to issue on his judgment, and sold the same land. Plaintiff's contention is, that his assignor acquired a lien upon the land prior to Dilehay, by reason of the fact that his assignor's levy upon the land was prior in point of time to the levy made under the execution issued on the Dilehay judgment. We have held that when judgments in favor of different parties, and against the same defendant, are recovered on the same day, that the judgment creditor first issuing execution and levying upon the debtor's property acquires a prior lien thereon: *Cook v. Dillon*, 9 Iowa, 407; 74 Am. Dec. 354; *Wilson v. Baker*, 52 Iowa, 423; *Lippencott v. Wilson*, 40 Iowa, 425. And it has ⁶⁰⁷ been held that when judgments held by different persons are not a lien upon property, the judgment creditor who first issues execution and levies upon the property secures a prior lien: *Lathrop v. Brown*, 23 Iowa, 48. So we have said that, when a judgment debtor has fraudulently transferred his property to another, the party who first invoked the aid of the court to set aside the conveyance was entitled to priority on the ground of his superior diligence. But that rule is applicable only to cases of fraudulent conveyances of real estate to hinder and delay creditors: *Bridgman v. McKissick*, 15 Iowa, 268. The case at bar, in its facts, does not come within either of these holdings. The judgments were not rendered on the same day. While it does appear that the judgment debtor enjoined the sale of the land, it does not appear upon what ground such action was taken, nor does it appear that the judgment debtor had fraudulently conveyed the land. Nor is this a case where the judgments were not a lien upon the property. Both of these judgments became a lien upon this after-acquired land at the same time. Under such circumstances, we have held that the liens attached to the property at the same instant, and that neither has priority over the other: *Ware v. Purdy* (Iowa, Oct. 16, 1894), 60 N. W. Rep. 526, and cases cited. See, also, *In re Hazard's Estate*, 73 Hun, 22; 25 N. Y. Supp. 928; *Black on Judgments*, sec. 432.

Having so recently considered this question, we need not further discuss it. While a rehearing has been granted in *Ware v. Purdy* (Iowa, Oct. 16, 1894), 60 N. W. Rep. 526, it is as to points other than the one now under consideration. That case is decisive of the question here presented. The court below erred in overruling the demurrer.

Reversed.

JUDGMENTS—LIENS OF—PRIORITY AS TO AFTER-ACQUIRED PROPERTY.—The liens of several judgments rendered at different terms against the same defendant have no priority over each other as regards property, the legal title to which is acquired by the defendant after all the judgments have been rendered, and such fund must be distributed amongst them *pari passu*: *Reefe v. McComb*, 2 Head, 558; 75 Am. Dec. 748. See, also, *Greenway v. Cannon*, 3 Humph. 177; 39 Am. Dec. 161, and note; and *Roads v. Symmes*, 1 Ohio, 281; 13 Am. Dec. 621, and note.

CARSE v. RETICKER.

[95 IOWA, 26.]

HUSBAND AND WIFE—DUTIES OF WIFE.—It is the duty of a wife, without compensation, to attend to all her ordinary household duties, and to labor faithfully to advance her husband's interests, but she is under no duty to undertake the boarding of large numbers of people, none of whom are members of his family.

HUSBAND AND WIFE—HIS RIGHT TO CONTRACT WITH HER AND GIVE HER THE PROCEEDS.—A husband who is the sheriff of a county and has the right to contract for the boarding of prisoners, may contract therefor with his wife, stipulating that she shall have all the profits of the contract, and his creditors cannot recover of her such profits or property in which they have been invested, especially if such creditors knew of such contract, assented to it when made, and encouraged and advised the wife to enter upon its performance.

MARRIED WOMEN'S RIGHT TO CARRY ON BUSINESS.—If, with the assent of a husband, his wife carried on any kind of business, she is entitled to its profits, if there is no intent to shield his property from his creditors.

EXEMPT EARNINGS—GIFT OF.—Under a statute exempting from execution the earnings of a debtor for his personal services, or those of his family, at any time within ninety days preceding the levy of a writ, he may within such time make a gift of such earnings to his wife, and his creditors cannot complain, because they are not thereby defrauded.

Suit in equity brought by Henry Carse against J. M. Reticker and his wife, A. C. Reticker, to have certain lands standing in the name of the wife decreed to belong to the husband, and to subject them to the payment of the plaintiff's judgment. The petition of the plaintiff was dismissed, and he appealed.

Smith McPherson and T. J. Hysham, for the appellant.

J. M. Junkin, for the appellees.

²⁵ **DEEMER, J.** Prior to the year 1879 the defendant J. M. Reticker was a member of a firm doing business in Rock Island, Illinois, under the name of Kelley & Reticker. ²⁶ During that year the firm failed in business, and Reticker became insolvent. Reticker, however, paid about half of the indebtedness of the firm, as we understand it, before the end of the year. In Oc-

tober of that year the plaintiff proposed to Reticker the feasibility of forming a partnership to engage in the boot and shoe business. Reticker suggested that some debts of the old firm of Kelley & Reticker were unpaid, and that he could not well engage in business in his own name. It was then proposed that a copartnership be formed, using the name of Reticker's wife, A. C. Reticker, as a member of the firm, and accordingly the copartnership of Carse & Reticker was formed. This firm continued in business until February, 1884, when plaintiff purchased Reticker's interest in the business, including the book accounts. At that time J. M. Reticker was owing the firm quite a large amount of money. This indebtedness is the basis of plaintiff's judgment against J. M. Reticker, which was first obtained in Illinois in April, 1890, and afterward, in the district court of Montgomery county, on the Illinois judgment in October, 1891. October 27, 1884, two hundred and eighty acres of land situated in Montgomery county were deeded to the defendant A. C. Reticker, and it is claimed that J. M. Reticker furnished the money which formed the consideration for the purchase of the land, and that the title was taken in the name of the wife for the purpose of defrauding his creditors, among whom was the plaintiff. This is denied by both defendants. They insist that the land was purchased by A. C. Reticker with money accumulated by her from her own earnings, and that J. M. Reticker has no interest therein.

The question presented by the appeal is largely one of fact, and it is not important that we do more than set forth, in a general way, our findings. It appears ²⁷ from the testimony that in the year 1882 defendant J. M. Reticker was elected sheriff of Rock Island county, Illinois, and that he held office until December, 1886. He was elected during the existence of the firm of Carse & Reticker, and at the time of his election he, with his wife, was living over the store in which the firm did business. Mrs. Reticker was employed in the store at a salary of five dollars per week. Soon after Reticker assumed the duties of his office, he discovered that there were large profits to be made in boarding the prisoners at the jail, of whom he had charge—the county paying fifty cents per day for each prisoner—and he proposed to his wife that they move to the jail and undertake this work. She disliked the proposed arrangement, and refused to go, whereupon the husband proposed to her that if she would move into the jail, and undertake the preparation of meals for

the inmates, she should have, as her own, all the profits made out of it, and that he would relinquish all claim thereto. Plaintiff was consulted with reference to the matter, as he ought to have been, and consented to and advised the arrangement. Mrs. Reticker accepted the proposition, moved to the jail, and, during the remainder of her husband's official term, superintended the boarding department of the jail. An account was kept of the number of persons boarded, upon which the county settled. This account was charged with the cost of food and provisions and supplies, and the balance, as drawn from the county every ninety days, was placed to the credit of A. C. Reticker. The total profits made in the business, as shown by the books, were something like seven thousand dollars. The Iowa land, as has been noticed, was purchased in October, 1884, in the name of A. C. Reticker. It was purchased largely on credit—Mrs. Reticker executing twelve notes, of about five hundred dollars each, for the ²⁸ greater part of the purchase price. It is claimed that the amount paid in cash on the land, and the payments made upon the notes, came from the profits arising from the board of the prisoners.

It is insisted on the part of appellant: 1. That no such agreement as claimed was ever made between these defendants; 2. That, if made, it was wholly without consideration, and void; and 3. If made at all, it was executed in the state of Illinois, and was void by the statutes of that state.

That there are some suspicious circumstances disclosed by the testimony with reference to the conduct of the parties under this alleged agreement is true, yet it is clearly and definitely testified to by each of the defendants, and is not denied by the plaintiff, although it is shown that he had knowledge thereof at the time it was made. The parties are husband and wife; and while this relationship presents an opportunity for the perpetration of fraud, which is too frequently taken advantage of, yet everyone is aware that legitimate business transactions between husband and wife are seldom, if ever, carried on according to strict business principles. There is really nothing in the evidence which cannot be explained upon a theory perfectly consistent with honesty and good faith, and we are not disposed to impeach the transaction. For a case in point, see *Gilbert v. Glenney*, 75 Iowa, 513.

It is further claimed that the agreement was without consideration, because it was the marital duty of A. C. Reticker to per-

form the services. We cannot accede to this doctrine. That it is the duty of the wife, as "helpmeet," to attend, without compensation, to all the ordinary household duties, and labor faithfully to advance her husband's interests, is true. Yet it certainly is not her duty, unless she desires to incur it, to undertake the boarding of a large ²⁹ number of prisoners who may for the time being come under the charge of her husband. These defendants had the undoubted right to contract with each other with reference to the board to be furnished the inmates of the jail, the same as if the marital relation did not exist. J. M. Reticker had the contract with the county to furnish the board, and could sublet it to whomsoever he wished—even to his wife, if she saw fit to engage in the work: *Gilbert v. Glenney*, 75 Iowa, 513; *Mewhirter v. Hatten*, 42 Iowa, 288; 20 Am. Rep. 618; *Hoag v. Martin*, 80 Iowa, 714. If there had been no relinquishment by the husband to the earnings of the wife accumulated while engaged in a separate business for herself, the rule might be different; but here, as we have seen, the husband expressly and completely abandoned all claim thereto.

Lastly, it is insisted that, as the contract was made in Illinois, its validity is to be determined by the laws of that state. Plaintiff introduced upon the trial certain sections of the statutes of that state which he claims are applicable to the case. One of these sections provides that "neither husband or wife shall be entitled to receive any compensation for labor performed or services rendered for the other, whether in the management of property or otherwise": Rev. Stats. 1881, sec. 8, p. 791. Another confers upon the wife the right to acquire and hold property, the same as her husband, but provides that no transfer of goods and chattels between them shall be valid, unless evidenced by writing and duly recorded. Even if applicable, we do not see the force of these statutes in the case at bar. The first is merely declaratory of the common law, and, under it, it was held by the supreme court of Illinois, in the case of *Hazelbaker v. Goodfellow*, 64 Ill. 241, that: "If, with the assent of the husband, the wife were to carry on any kind of business, ³⁰ she would be entitled to the profits, if it were bona fide hers, and there was no intent to shield the husband's property from his creditors. So no reason is perceived why the husband might not, if the transaction was not tainted with fraud, permit his wife to raise and sell grain, stock, and other farm products, and receive the profits." As to the plaintiff in this case, who was perfectly familiar with the

transaction, and who, as the evidence shows, was consulted, and advised it, there was no fraud. But aside from this decision, what is there in the statute quoted which inhibits the wife from claiming the profits arising from the boarding of the prisoners, where the husband has relinquished all claim thereto? We see nothing. True, the services were, in a sense, rendered for the husband, but not as such. As we have seen, no duty rested upon her to perform them. She received the profits resulting, from time to time, as they were earned, directly from the county, and, according to the testimony, held them as her separate property. She is not seeking to recover compensation for labor performed or services rendered for her husband. The case is much like *Riley v. Mitchell*, 36 Minn. 3. The case of *Peterson v. Mulford*, 36 N. J. L. 481, is, in principle, quite like the case at bar. In this case it is said: "There can be no question but that the husband is entitled to the services of his wife, if he claims them, and also to the proceeds of her labor, unless he permits her to labor for her own account, or, after she has earned or received the proceeds, gives them to her, or allows her to appropriate them to her own use. This is clear by the common law, and is recognized in all the cases in this state where the question has been considered." On page 489 of the same case it is said that if the husband permits the wife to ³¹ labor for herself, or, after having labored, makes her a gift of her earnings, it is valid, even as against creditors, for the reason that there is no law that requires a husband to cause his wife and children to labor for his creditors: See, also, *Cubberly v. Scott*, 98 Ill. 39. The other statute referred to has no possible application to this case.

Another view of the case is fatal to appellant's claim. If it be conceded that the money earned by the wife in the keeping of boarders belonged to the husband, by reason of the marital relation existing between them and because it was her personal earnings, then he had the right to give these earnings to his wife, and she could use them as she saw fit. They were all collected and placed to her credit, according to the testimony, within ninety days from the time they were earned, and were therefore exempt from execution, and creditors have no right to complain of the disposition made of them. This is undoubtedly the rule in this state (*Robb v. Brewer*, 60 Iowa, 539), and we are not advised of anything prohibiting it in the statute of Illinois. From what we have said, it is apparent that plaintiff is not entitled to the relief asked, and the decree is affirmed.

[To understand the point decided in the last paragraph of the opinion it is necessary to refer to the case of *Robb v. Brewer* therein cited. In that case it appeared that the property had been purchased in the name of the wife and paid for out of the earnings of her husband, somewhat supplemented by profits realized by her from keeping boarders and doing plain sewing for persons other than members of his family. His creditors brought a suit in equity to subject to the satisfaction of his debts the property so acquired. The court in denying the relief sought held that the use of the personal earnings of the husband in paying for the property purchased by his wife was a gift of such earnings, and that, because they were exempt from execution, the gift could not prejudicially affect his creditors. The statute relied upon as thus exempting them corresponds to section 4299 of McClain's code, edition of 1888, declaring that "the earnings of such debtor for his personal services, or those of his family at any time within ninety days next preceding the levy, are also exempt from execution or attachment."]

HUSBAND AND WIFE—GIFT—WIFE'S PERSONAL EARNINGS—EXEMPTION.—A husband may make a valid gift of either real or personal property to his wife: Note to *Morgan v. Ball*, 15 Am. St. Rep. 37; *Fox v. Jones*, 1 W. Va. 205; 91 Am. Dec. 383; *Peck v. Brummagin*, 31 Cal. 440; 89 Am. Dec. 195; *Garner v. Garner*, Bus. Eq. 1; 57 Am. Dec. 583; which will not be liable for the husband's debts afterward contracted: *Peck v. Brummagin*, 31 Cal. 440; 89 Am. Dec. 195. Her personal earnings belong to her husband, unless he has given them to her: *Belford v. Crane*, 16 N. J. Eq. 265; 84 Am. Dec. 155; and he cannot, as against his creditors, give, or agree to give, them to her: *Cramer v. Reford*, 2 C. E. Green, 367; 90 Am. Dec. 504; note to *McKinnon v. McDonald*, 72 Am. Dec. 577. That the personal earnings of a wife, which have been given to her by her husband, are her separate property as against subsequent creditors of the husband, see *Yake v. Pugh*, 13 Wash. 78; 52 Am. St. Rep. 17, and note. The earnings of a wife do not become her separate property while she is living with her husband. They can only become such when she lives separate from him: *Abbott v. Wetherly*, 6 Wash. 507; 30 Am. St. Rep. 176. Real estate purchased with wife's earnings during coverture belongs to the husband, and is subject to be taken for his debts: *Cramer v. Reford*, 2 C. E. Green, 267; 90 Am. Dec. 504. The earnings of a judgment debtor, in Iowa, for his personal services, or those of his family, at any time within ninety days next preceding the levy, are exempt from execution and attachment, see monographic note to *Brown v. Hebard*, 91 Am. Dec. 413, on exemption of earnings or wages from execution and attachment.

ELSWORTH v. DORWART.

[96 IOWA, 108.]

CORPORATIONS—RIGHT TO INSPECT BOOKS AND PAPERS—STATUTE.—Under a statute authorizing it, a stockholder of a corporation is entitled, at all reasonable times, and for a proper purpose, to inspect the original record, stock, and transfer books, and the record of the financial condition of the company.

CORPORATIONS—RIGHT TO INSPECT BOOKS AND PAPERS—ASKING TOO MUCH.—Under a statute authorizing a stockholder of a corporation to examine certain books and papers of the company, neither an officer of the company, nor a court on mandamus proceedings, is authorized to refuse him the right to see any of the books or papers, merely because he has asked to inspect more than he is entitled to see.

CORPORATIONS—RIGHT TO INSPECT BOOKS AND PAPERS—DISCRETION OF COURT.—If a statute confers, in absolute terms, a right to inspect certain books and papers of a corporation, the court has no discretion on mandamus proceedings by a stockholder to refuse the exercise of the right, in any case, except where it is clearly apparent that the purpose of asking it is to gratify an idle whim, or to perplex, annoy, or harass the officers having the books and papers in charge.

CORPORATIONS—RIGHT TO INSPECT BOOKS AND PAPERS—NO GROUND FOR DENIAL.—A stockholder's statutory right to examine certain books and papers of a corporation cannot be denied on the ground that the applicant is unfriendly toward the president of the company, nor because he is accompanied by his attorney and a stenographer to assist him in making the examination.

MANDAMUS—INSPECTING BOOKS OF CORPORATION—STATUTE—PLEADING.—A statute authorizing a stockholder of a corporation to inspect the original record, stock, and transfer books, and the record of the financial conditions of the company, does not, perhaps, if strictly construed, confer the right to inspect the original papers and vouchers of the corporation. Hence, in mandamus proceedings by a stockholder to compel an examination of the original papers and vouchers, he should plead and prove that some property right is involved, or that some controversy exists, or that some specific and valuable interest is in question, to settle which an inspection of these documents becomes necessary.

Mandamus to compel S. S. Dorwart, secretary and assistant treasurer, and C. J. Ives, president and general superintendent, of the Burlington, Cedar Rapids & Northern Railway Company, to exhibit certain books and papers of the corporation to plaintiff for his inspection and examination. The plaintiff appealed from a judgment dismissing his petition.

Clark Varnum and C. M. Nagle, for the appellant.

S. K. Tracey and J. C. Leonard, for the appellees.

¹⁰⁸ **DEEMER, J.** Plaintiff is now, and for many years has been, a stockholder in the Burlington, Cedar Rapids & Northern Railway Company, a corporation organized under the general

incorporation laws of this state. The defendant Dorwart is the secretary and assistant treasurer of this corporation, and the defendant Ives is its president and general superintendent. These officers have charge and control of the books of the corporation which are kept at the company's general offices in the city of Cedar Rapids. On the twenty-first day of April, 1893, the plaintiff applied to the secretary for permission to examine the stock ledger, original record, stock-book, transfer-book, financial record, and all books and vouchers pertaining to the financial affairs of the corporation. In compliance with this request, Dorwart produced the stock-book and stock ledger, and plaintiff was permitted to examine them for a few moments only; whereupon the defendant Ives directed that the books be taken from plaintiff, refused to permit him to examine them further, and denied him the right to examine any other of the books or vouchers of the corporation. The request was made by plaintiff as a stockholder, at a seasonable time and in a reasonable manner. Plaintiff thereupon brought this action, but his petition was denied by the court, and thereupon he prosecuted an appeal to this court.

The following are the material sections of the statutes bearing upon the questions for determination: ¹¹⁰ "The stock books of the company must be so kept as to show intelligibly the original stockholders, their respective interests, the amount paid on their shares, and all transfers thereof; and such books, or a correct copy thereof, so far as the items mentioned in this section are concerned, shall be subject to the inspection of any person desiring the same": Code, sec. 1078. "The offices of secretary and treasurer, or assistant treasurer, and general superintendent, of every railway corporation organized under the laws of this state, shall be kept where the principal place of business of such corporation is to be, in which offices the original record, stock, and transfer books, and all the original papers and vouchers of such corporation shall be kept; and such treasurer or assistant treasurer shall keep a record of the financial condition of the corporation which may be inspected at all reasonable hours by any stockholder or any committee appointed by the general assembly": Code, sec. 1279. It would seem from these sections that it is the absolute right of any person to examine the stock and transfer books of a corporation organized under the laws of this state, whether he shows himself interested therein or not; and it likewise appears that a stockholder has the right at all reason-

able hours to inspect the records showing the financial condition of the corporation. A strict construction of the statute, perhaps, does not give him the right to examine the original papers and vouchers, and, if such right exists at all, it is given by a liberal construction of the language used, or by the common law. It is difficult for us to see on what theory plaintiff was denied the right to inspect the original record, stock, and transfer books, and the record of the financial condition of the company. The statute quoted plainly confers the right. Plaintiff ¹¹¹ asked it at a reasonable time, and was denied it, for some reason which is not disclosed.

It is said in appellee's argument that plaintiff requested and prayed for more than he was entitled to, and that they and the court were justified in denying him the right to examine any of the books. We do not think this is the rule. It was the duty of the officer, upon request, to exhibit to plaintiff such books as he was entitled to, although he called for more than he could rightfully demand; and the court was not justified in refusing him all relief because he asked for more than he was entitled to.

It is also said that the granting of the writ rested in the sound discretion of the court, and that, as the court was authorized to find that plaintiff sought the books to gratify an idle curiosity or with some unworthy motive, this court ought not to interfere. Concede that the court had a discretion in the matter, yet it is a legal discretion, which ought not to be abused. The statutes seem to confer the right in absolute terms, and, if it is to be refused in any case, it seems to us it should only be done when it is clearly apparent that the purpose of asking it is to gratify an idle whim, or to perplex, annoy, or harass the officers having the books in charge. Such intent does not appear in this case; and, if it did, we are not prepared to say that it would warrant the refusal of a statutory right. All that is shown in this connection is, that plaintiff did not feel kindly toward Mr. Ives, the president, and that he had commenced some suits against him.

It is also contended that appellant had no right to examine the books at the time he requested it, because ¹¹² he was accompanied by his attorney and a stenographer. This is not a sufficient excuse. Plaintiff had the right to have his attorney with him, and the attorney had a right to an amanuensis. Neither was present for an improper purpose. Each was there to speed and facilitate the investigation: *Foster v. White*, 86 Ala. 467.

As we have seen, the statute does not confer the right to examine the original papers and vouchers of the corporation, and we think that, to entitle plaintiff to it, he should plead and prove that some property right is involved, or that some controversy exists, or that some specific and valuable interest is in question, to settle which an inspection of these documents becomes necessary: *People v. Walker*, 9 Mich. 328; *Stettaner v. New York etc. Construction Co.*, 42 N. J. Eq. 46.

The court was in error in denying plaintiff the right to examine the original record, stock, and transfer books, and the record of the financial condition of the corporation; and the judgment is reversed.

CORPORATIONS—RIGHT TO INSPECT BOOKS AND PAPERS
—MANDAMUS.—A stockholder has the right to inspect the books and other papers of a corporation under a statute giving him at all reasonable times the right to examine the records and books of account of the corporation: *Stone v. Kellogg*, 165 Ill. 192; 56 Am. St. Rep. 240; and he may enforce such right by mandamus: *Swift v. Richardson*, 7 Houst. 338; 40 Am. St. Rep. 127, and note, showing, however, that the writ will issue only when there is a clear specific right to be enforced. A denial of the stockholder's right, by the corporation, in a proper case, exposes it to action, either in mandamus or for damages: *Legendre v. New Orleans etc. Assn.*, 45 La. Ann. 669; 40 Am. St. Rep. 243; monographic note to *Potwin Place v. Topeka Ry. Co.*, 37 Am. St. Rep. 317-323, on mandamus to private corporations to compel performance of duties. A stockholder's statutory right to examine the books and papers of a corporation is absolute, except that it shall not be exercised from idle curiosity or for improper or unlawful purposes: *Stone v. Kellogg*, 165 Ill. 192; 56 Am. St. Rep. 240; *Legendre v. New Orleans etc. Assn.*, 45 La. Ann. 669; 40 Am. St. Rep. 243. A stockholder's right to make abstracts and memoranda of documents, books, and papers is as full and complete as is his right to an inspection thereof: Note to *Stone v. Kellogg*, 56 Am. St. Rep. 245.

SOLAN v. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.

[95 Iowa, 260.]

NEGLIGENCE — CONTRACT AGAINST — INTERSTATE SHIPMENT.—A statute which prohibits contracts exempting transportation companies from liability for negligence, applies to an interstate shipment. Hence, if one in charge of a shipment of cattle from one state to another, is injured by the negligence of a railroad company, he may recover such an amount as will compensate him for the injury sustained, although the contract of shipment limits the liability for such injury to a smaller amount.

Action to recover for personal injuries alleged to have been caused by the negligence of the defendant in permitting one of

the rails in its track to become weak, cracked, and out of repair, and in running the caboose in which the plaintiff was riding at a negligent rate of speed, in consequence of which said caboose was derailed, and the plaintiff injured. Plaintiff obtained a verdict and judgment for one thousand dollars, and the defendant appealed.

George E. Clark, for the appellant.

Powers & Conway and W. D. Boies, for the appellee.

²⁶¹ GIVEN, C. J. 1. Plaintiff was injured at a point in Iowa when being carried over defendant's road in a caboose attached to a freight train, in which one or more cars of cattle, in charge of plaintiff, were being transported. Plaintiff and the cattle were being carried under a contract between the owner of the cattle and the defendant for their transportation from Rock Valley, Iowa, to the Union Stock Yards in Illinois. Said contract contains this provision: "8. That the company shall in no event be liable to the owner or person in charge of said stock for any injury to his person in an amount exceeding the sum of five hundred dollars." The trial court instructed the jury that, if it found for the plaintiff, it should allow him such an amount as would compensate him for the injuries sustained. Appellant contends that the court erred in not instructing that, under the contract, plaintiff was not entitled to recover, if at all, more than five hundred dollars, and in this contention we have the only question presented on this appeal. We have no argument for appellee.

2. Appellant assumes that the court omitted to instruct that plaintiff could not recover more than five hundred dollars, upon the theory that the part of said contract quoted above was void, under section 1308 of the code of Iowa. That section is as follows: "No contract, receipt, rule, or regulation shall exempt any corporation engaged in transporting persons or property by railway from liability of a common carrier, or carrier of passengers, which would exist had no contract, receipt, rule, or regulation, been made or entered into." Appellant's contention is, that as this was a contract for an interstate shipment, and as the power to regulate commerce between the states is exclusively in the congress of the United States, said section does not apply. It cannot be questioned but that this was an interstate shipment, and that Congress alone ²⁶² possesses power to regulate commerce between the states; but the inquiry remains whether said

section, as applied to this contract, is a regulation of commerce. Appellant concedes "that up to the present time your honors have refused to adopt the application and construction which is now contended for." In the case of *Hart v. Chicago etc. Ry. Co.*, 69 Iowa, 486, the contract was for the shipment of horses from a point in this state to a point in another, and provided that no liability would be assumed by the carrier on the horses for more than one hundred dollars each. Question was made whether section 1308 was applicable, and it was contended "that the state had no power to place a restriction of that character upon the carrier contracts for the transportation of property from this state into another state or territory." The court says: "The position is, that the restriction, if applicable to a contract of this character, would be a regulation of commerce among states, and a subject which, under the federal constitution, is within the exclusive jurisdiction of the Congress of the United States. In our opinion, however, this position cannot be maintained. The provision is in no just or legal sense a regulation of commerce. It prescribes no regulation for the transportation of freight upon any of the channels of communication. It leaves the parties free to make such contracts as they may choose to make with reference to the compensation which shall be paid for the services to be rendered. The carrier is left free to demand such compensation for the carriage of the property as is just, considering the responsibility he assumes when he receives it. He is forbidden to make any contract that would exempt him from any of the liabilities which arise by implication from his undertaking to carry the property. But no burden is placed upon the property which is the subject of the contract, nor is any rule prescribed for his ²⁶³ government respecting it. That it is within the power of the state to prescribe such a limitation upon his power to contract we have no doubt. The statute was enacted by the state in the exercise of the police power with which it is vested, and it is applicable to all contracts entered into within its jurisdiction. The question involved is not different in principle from that decided by the supreme court of the United States in what are known as the Granger cases: See *Munn v. Illinois*, 94 U. S. 113; *Chicago etc. Ry. Co. v. Iowa*, 94 U. S. 155; *Peik v. Chicago etc. Ry. Co.*, 94 U. S. 164." Appellant insists that upon authorities cited, and especially the decisions of the supreme court of the United States, we should now announce a different holding. Appellant cites *Wabash etc. Ry. Co. v. Illi-*

nois, 118 U. S. 557, Philadelphia etc. S. S. Co. v. Pennsylvania, 122 U. S. 326, and Fargo v. Michigan, 121 U. S. 230, holding that the states have no power to fix rates for interstate shipments. The case of Hart v. Pennsylvania R. R. Co., 112 U. S. 331, is quoted from at length, and largely relied upon as supporting appellant's contention. That was an interstate shipment of horses, under a contract wherein it was agreed that the carrier assumed a liability on the horses "not exceeding two hundred dollars each." The question was whether this clause in the contract was void as against public policy, not because of any statute, but under the common law. The court says: "It is the law of this court that a common carrier may, by special contract, limit his common-law liability, but that he cannot stipulate for exemption from the consequence of his own negligence or that of his servants." The court, finding that it was "a limited liability livestock contract, and is confined to livestock," and that the rate of freight was measured by the valuation expressed, announces this conclusion: "The distinct ground of the decision in ²⁰⁴ the case at bar is, that where a contract of the kind, signed by the shipper, is fairly made, agreeing on the valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations." The reasoning of all the cases cited upon this subject is, that the rates charged are based upon the valuation, that the limitation as to value does not exempt from liability for negligence, nor induce want of care, and is not therefore within the rule that declares contracts exempting from liability for negligence void. Appellee's cause of action is grounded upon the negligence charged, and the contract is for exemption from liability beyond the sum named for that negligence. The reasoning of the cases cited does not apply. Plaintiff was not being carried for a consideration based upon an agreed value of his life or limb. No case is cited, and none, we think, can be found, wherein an agreement for exemption from liability for negligence in the carrying of passengers has been sustained: See *Rose v. Des Moines etc. R. R. Co.*, 39 Iowa, 247. This contract is within the rule of the common law that declares such contracts

void as against public policy, and within the prohibition of section 1308. Surely, neither the statute nor the common law that so declares can be said to "regulate commerce." To so declare is quite different from fixing rates, or from forbidding the making of lawful contracts. In our opinion, neither the common-law rule nor the statute to which we have referred is, as applied to this contract, in any proper sense an attempt to regulate commerce. This conclusion renders it unnecessary ²⁶⁵ that we consider appellant's further contention, that the United States has never adopted the common law.

Affirmed.

CARRIERS—NEGLIGENCE—CONTRACT AGAINST—INTER-STATE COMMERCE.—At common law, a carrier cannot, even by express contract, stipulate against his own negligence: *Hudson v. Northern Pac. Ry. Co.*, 92 Iowa, 231; 54 Am. St. Rep. 550; note to *Duntley v. Boston etc. R. R.*, 49 Am. St. Rep. 613. Until Congress shall enact statutes controlling the subject, the right of carriers, operating lines in two or more states, to exact and enforce stipulations limiting their liability for negligence is controlled by the common law, and the common law upon the subject is not superseded by the nonexercise of the authority of Congress: *Davis v. Chicago etc. Ry. Co.*, 98 Wis. 470; 57 Am. St. Rep. 685.

NIX v. GOODHILL.

[96 Iowa, 282.]

PROCESS—ABUSE OF PROCESS is the malicious perversion of a regularly issued process to accomplish some purpose whereby a result not lawfully nor properly attainable under it is secured.

PROCESS, ABUSE OF.—AN ACTION will lie for a malicious abuse of legal process.

PROCESS—IT IS A MALICIOUS ABUSE OF LEGAL PROCESS for a creditor to direct a sheriff to serve an execution by garnishment for a debt due for personal earnings exempt from execution.

PROCESS, ABUSE OF—GARNISHMENT OF EXEMPT WAGES.—AN ACTION will lie against one who maliciously, and without probable cause, garnishes exempt earnings of his judgment debtor; and there is malice and want of probable cause, where the creditor knows such earnings to be exempt, but seeks to coerce the debtor into payment, out of his exemption, to avoid discharge by his annoyed employer.

Action for malicious garnishment of wages exempt from execution. The plaintiff, Nix, was a judgment debtor of the defendant, Goodhill. The plaintiff was an employé of the Illinois Central Railway Company, and the head of a family. On January 21, 1894, there was due him from the company twenty-five dollars, his wages for the forty days next preceding. The com-

pany paid its employ  s about the 25th of each month. Such wages, being his personal earnings, were exempt from execution. Goodhill took out execution on his judgment, garnished the company, and on the day that the garnishment was returnable the proceeding was dismissed. The plaintiff then brought this action, alleging, among other things, that the defendant, well knowing that said personal earnings were exempt from execution, and would be paid in a few days, "knowingly, willfully, and maliciously, and with the purpose and intent to vex, harass, and injure this plaintiff, and to deprive him of said money, and the use thereof, and to unlawfully subject said exempt money to the payment of debts, and to vex, harass, and annoy said railroad company, so as to cause said railroad company to discharge plaintiff from their employ, and to cause and compel this plaintiff, in order to prevent such discharge, to use such exempt money, against his will, to pay the judgment hereinafter mentioned and described," cause and direct the sheriff to garnish such wages. A demurrer to the petition was sustained, and the plaintiff appealed.

Charles Husted, for the appellant.

Yoran & Arnold, for the appellee.

²⁸³ GRANGER, J. The only question in the case arises on the demurrer to the petition. Because of a growing practice in the state, the question is an important one. By observing the averments of the petition it will be seen that the action is for an abuse of legal process in a ²⁸⁴ civil suit, the defendant having directed the sheriff to serve the execution by a garnishment of the company for a debt due for personal earnings exempt from execution. It is a rule of law of very general recognition that an action will lie for an abuse of such process. In Cooley on Torts, second edition, page 220, it is said: "If process, either civil or criminal, is willfully made use of for a purpose not justified by the law, this is abuse for which an action will lie." The same section gives some illustrations, as "entering up a judgment and suing out execution after a demand is satisfied, suing out an attachment for an amount greatly in excess of the debt; causing an arrest for more than is due, and levying an execution for an excessive amount." These are but some of the abuses for which an action will lie. In fact, the right to such an action is not seriously to be questioned, but the more difficult question is, What is an abuse of process, so as to render it actionable? We

should be careful to observe a distinction between suing out of a writ and the improper use of the writ after it is issued, for such a distinction is preserved on authority: See *Bartlett v. Christhilf*, 69 Md. 219. In the same case it is said: "There are instances in which the writ, regularly and properly sued out, was perverted, abused, and made an instrument of oppression. Either something not warranted by its terms or something in excess of that which was warranted was done under it. It would, indeed, be a serious reproach to the law, if in such cases it afforded no remedy or redress to the injured party. The denial of a remedy in such cases, upon the ground that the law was incapable of affording redress, would be a most serious reflection upon the remedial efficacy of any system of jurisprudence. It would proclaim to the evil disposed an unrestricted license to vex, harass, and injure without accountability, even though their victims should be utterly ruined in their circumstances." In the same case it is said: ²⁸⁵ "A malicious abuse of legal process consists in the malicious misuse or misapprehension of that process to accomplish some purpose not warranted or commanded by the writ." In 2 Addison on Torts, section 868, it is said: "Whoever makes use of the process of the court for some private purpose of his own, not warranted by the exigency of the writ or the order of the court, is answerable to an action for damages for an abuse of the process of the court." The authorities are strong, if not quite uniform, that the unlawful use of the process must be malicious, and without probable cause; the rule being akin, in that respect, to actions for malicious prosecution. In fact, the two actions are of the same general character, the one being the malicious prosecution of a suit and the other the malicious use of process issued in aid of a proceeding, either pending or determined. Keeping in view that such an action is warranted when the process of the court is maliciously and without probable cause misused or misapplied to accomplish some purpose not warranted or commanded by the writ, we are in position to apply the rule to the facts in this case. The property in question is by law exempt from execution, which means that it is not to be seized upon execution for the debts of the owner: Code, sec. 3072. Hence such a levy is not warranted under the law. The execution, if against the property of the judgment debtor, requires the sheriff "to satisfy the judgment and interest out of property of the debtor subject to execution": Code, sec. 3033. It is thus seen that nothing in the law nor on the face of the process war-

rants the seizure of exempt property. But where it is done, more than the unwarrantable act is required. It must be done maliciously, and without probable cause. In this case it is admitted that the defendant directed the garnishment, not only with knowledge of the exemption, but maliciously, and with a purpose unlawfully to subject the exempt money to ²⁸⁶ the payment of his debt, by vexing and harassing the company, and to compel the plaintiff, in order to avoid a discharge, to use the exempt money against his will to pay the debt. The facts bring the case clearly within the rule. It is clearly an unlawful use of the process, and as clearly an abuse of it. Appellee seems to think the fact important that the execution was valid, and that what was done "was in excess of that which was warranted." The rule of the authorities is, that such an action lies for an abuse of process legally issued. In *Bartlett v. Christhilf*, 69 Md. 219, it is said, in speaking of such an abuse of process: "In brief, it is the malicious perversion of a regularly issued process to accomplish some purpose whereby a result not lawfully nor properly attainable under it is secured." That is precisely what was done under the process in this case. Appellee makes the claim that the exemption was the debtor's personal privilege, which might be claimed or waived at his option. The same would be true of the levy upon the property of a third person. If he did not assert his rights, his property might be sold for the debts of another. But would the law permit it to be taken with the purposes and motives admitted in this case, without remedy for such an act? We think it is a mistaken view that the exempt property of a judgment debtor may rightfully be taken on execution, relying on the exercise of a personal privilege to retake or protect it as exempt. It is protected from interference in such manner both by the law and the face of the writ, which commands the taking of property not exempt from execution. The rule claimed for this personal privilege would permit the judgment creditor to enter the home, and take therefrom provisions and household goods, exempt, with the purpose to vex and harass the debtor into the payment of a debt or judgment. Such a proceeding is a misuse and abuse of the processes of the court, and, when done with the ²⁸⁷ motives indicated, it is actionable. No case cited, nor that we have discovered, is against such a rule. The demurrer to the petition should be overruled.

Reversed.

PROCESS, ABUSE OF—MALICIOUS ATTACHMENT. — If process is willfully made use of for a purpose not justified by law, it is an abuse for which an action will lie: *Antcliff v. June*, 81 Mich. 477; 21 Am. St. Rep. 533. An attachment can be levied only on such property as is subject to levy and sale under execution: *Roby v. Labuzan*, 21 Ala. 60; 56 Am. Dec. 237. An officer who attaches goods exempt by law from attachment is a trespasser: *Kiff v. Old Colony etc. Ry. Co.*, 117 Mass. 591; 19 Am. Rep. 429. Compare note to *Burton v. Knapp*, 81 Am. Dec. 476, on plaintiff's liability for seizure of exempt property. It is an abuse of process for a party to take out a writ of attachment, knowing it to be invalid, and attach property under it not subject to levy: *Rosenthal v. Circuit Judge*, 98 Mich. 208; 39 Am. St. Rep. 535. As to requisites of complaint in action for malicious attachment, see *Beyersdorf v. Sump*, 39 Minn. 495; 12 Am. St. Rep. 678. The swearing out of a false attachment without probable cause is actionable, without an arrest or seizure of property: *Brand v. Hinchman*, 68 Mich. 590; 13 Am. St. Rep. 362. Want of probable cause in itself raises a presumption of malice: *Brand v. Hinchman*, 68 Mich. 590; 13 Am. St. Rep. 362.

COLLINS v. MERCHANTS AND BANKERS' MUTUAL INSURANCE COMPANY.

[95 IOWA, 510.]

INSURANCE—CONSTRUCTION OF STIPULATION AS TO ENCUMBRANCES.—A provision in a policy of insurance that it shall be void if the property is, in any manner encumbered, "and such fact be not stated in this policy or the assured's application for insurance," is a stipulation against encumbrances existing when the contract is made, but not against future encumbrances.

INSURANCE—INCREASE OF RISK—MORTGAGE—QUESTION OF FACT.—Whether there has been an increase of risk or not, from the fact that property has been mortgaged, since its insurance, is a question of fact for the jury to be determined by them from the evidence, upon proper instructions from the court.

Action upon a policy of fire insurance issued to J. R. Biery, but the loss, if any, being made payable to E. L. Collins, mortgagee, as his interest might appear. There was a judgment for the plaintiff, and the defendant company appealed.

Read & Read, for the appellant.

White & Clarke, for the appellee.

⁵⁴⁰ DEEMER, J. On the sixteenth day of September, 1890, the defendant issued to one J. R. Biery a policy of insurance in the sum of eight hundred dollars, upon a certain flouring mill, machinery, and fixtures, situated in Guthrie county, Iowa, of which Biery was the owner, subject to encumbrances amounting in the aggregate to ⁵⁴¹ fourteen hundred and sixty dollars. Loss, if any, was made payable to appellee, Collins (who held a

mortgage upon the property), "as his interest may appear." On the sixteenth day of February, 1893, the property covered by the policy was totally destroyed by fire. Due notice and proofs of loss were given to defendant, but it failed to make payment. Suit was thereupon instituted, which resulted in a verdict for the appellee, Collins, and the insurance company appeals.

But two questions are presented for our determination:

1. The defendant pleaded in the second count of its answer the following provision of the policy: "This contract shall be void and of no effect unless consent in writing is indorsed thereon by the president and secretary of the company in each of the following instances: . . . If it [the property] be in any manner encumbered or in litigation, and such fact be not stated in this policy or the assured's application for insurance," and further averred that on or about the twenty-first day of May, 1891, the property covered by said policy was encumbered by a mortgage for six hundred dollars, executed by J. R. Biery, the assured, and his wife, to one F. Peters, without the knowledge or consent of the defendant. A demurrer to this count of the answer, on the ground that it constituted no defense, for the reason that there is no warranty or condition in the policy sued on against future encumbrances, was sustained. Appellant complains of this ruling, and insists that the statement in the policy before quoted is not only a present, but a continuing, warranty, and that the six hundred dollar mortgage placed upon the property after the issuance of the policy was a breach of warranty, which rendered the policy void and of no effect, while appellee insists that the affirmation or warranty is as to an existing condition, and should not be construed to be a continuing or future ⁴⁴³ warranty. If the statement in the policy was that it should be void if the property be in any manner encumbered or in litigation, then, no doubt, it should be so construed as to cover future as well as existing encumbrances: *Mallory v. Farmers' Ins. Co.*, 65 Iowa, 450; *Ellis v. State Ins. Co.*, 61 Iowa, 577. But the policy contains more than this. It says it shall be void under these circumstances, unless the fact is stated in this policy or the assured's application for insurance. Taking the whole of the statement, and viewing it in the light of the settled rules of construction to be applied in interpreting such instruments, and we think it is reasonably clear that the encumbrance stipulated against is one which would ordinarily be stated in the face of the policy or in the application for insurance. Manifestly,

this is an existing or present one, and not one created in the future. The words used are certainly open to this construction, and, if so, we should adopt that which is most favorable to the assured under all the established tenets: *Garretson v. Equitable etc. Assn.*, 93 Iowa, 402; *Morse v. Buffalo etc. Ins. Co.*, 30 Wis. 534; 11 Am. Rep. 587; *Aurora etc. Ins. Co. v. Kranich*, 36 Mich. 289; *De Graff v. Queen Ins. Co.*, 38 Minn. 501; 8 Am. St. Rep. 685; *Niagara Fire Ins. Co. v. Scammon*, 100 Ill. 644; *Thompson v. Phenix Ins. Co.*, 136 U. S. 287; *First Nat. Bank v. Hartford Life Ins. Co.*, 95 U. S. 673; *Teutonia Fire Ins. Co. v. Mund*, 102 Pa. St. 89. Courts will not give such statements the force of continuing warranties, unless, from the language used and the nature and usages of the risk, it is evident that it was so intended and understood by the parties. It will leave the future subject only to the conditions as to increase of risk. These rules are equitable, for the insurer has it in his power to make the contract plain and distinct; and, where there is room for a reasonable doubt as to the intention of the parties, the language⁵⁴² used should be construed favorably to the assured. We think the demurrer was properly sustained.

2. The defendant pleaded in answer a condition of the policy against increase of risk, and insisted that the six hundred dollar mortgage placed by Biery upon the property after the execution and delivery of the policy constituted such a change and increase in the risk as avoided it. It is contended by counsel for appellant that there is no testimony tending to show an increase of risk by the execution of the mortgage, but they insist that the court should hold as a matter of law that the execution of a mortgage upon the property insured does increase the hazard. We do not think this is the rule. Whether there has been an increase of risk or not is a question of fact for the jury, to be determined by them from the evidence, upon proper instructions from the court. As said in the case of *Crittenden v. Springfield etc. Ins. Co.*, 85 Iowa, 658, 39 Am. St. Rep. 321: "It is, we think, a question of fact, whether a particular fact claimed to increase the risk was really one that the parties contemplated or not, or perhaps whether a particular fact did amount to an increase of risk. It is generally true that an encumbrance that lessens the interest of the assured in the property adds to the risk of the assured, but collateral facts may vary the rule. The usual custom is to provide in terms in the policy against encumbrances, except by permission of the company; and where it is

not done, as in this case, we are not prepared to hold as a matter of law that the parties designed it": See, also, *Martin v. Capital Ins. Co.*, 85 Iowa, 643, 650, and cases cited; *Russell v. Cedar Rapids Ins. Co.*, 71 Iowa, 69; *Russell v. Cedar Rapids Ins. Co.*, 78 Iowa, 216. The cases of *Lee v. Agricultural Ins. Co.*, 79 Iowa, 379, and *Ellis v. State Ins. Co.*, 61 Iowa, 577, ⁵⁴⁴ are not in point. In *Lee v. Agricultural Ins. Co.*, 78 Iowa, 216, the policy contained this provision: "If the property, either real or personal, or any part thereof, shall become encumbered by mortgage, judgment, or otherwise, the entire policy, and every part thereof, shall be null and void, unless written consent of the company at the home office is obtained." It was held that the subsequent execution of a mortgage upon the property insured avoided the policy. In *Ellis v. State Ins. Co.*, 61 Iowa, 577, the provision was: "If the title of the property is transferred, encumbered, or changed, this policy shall be void." It is there held that the execution of a mortgage upon the property subsequent to the issuance of the policy avoided it. Authorities from other states announcing the rule we have here established are abundant: 1 *Wood on Insurance*, sec. 243, and cases cited; *Clement's Digest of Fire Insurance*, 236, and cases cited.

The defendant's motion to direct a verdict interposed at the close of the introduction of plaintiff's testimony was properly overruled. Defendant asked an instruction to the effect that the execution of the Peters mortgage was such an increase of risk as avoided the policy, and, after the verdict was returned, it also moved in arrest of judgment, upon the ground that, as the pleadings admitted the execution of the subsequent mortgage, it was apparent that the risk has been increased. This instruction was refused and the motion denied. From what we have said, it is manifest that we are of the opinion these rulings were correct. We see no error in any of the rulings complained of, and the judgment is affirmed.

INSURANCE—INCREASE OF RISK—MORTGAGE—QUESTION OF FACT.—The execution of a mortgage on insured property does not violate a condition in the policy as to increase of risk, unless it is found that the execution of the mortgage did increase the risk: *Crittenden v. Springfield etc. Ins. Co.*, 85 Iowa, 652; 39 Am. St. Rep. 821. Whatever tends to increase the risk is a question of fact for the jury: *Clark v. Union Mut. etc. Ins. Co.*, 40 N. H. 333; 77 Am. Dec. 721.

STATE v. WHEELOCK.

[95 IOWA, 577.]

POLICE POWER—SALE OF NOSTRUMS BY ITINERANTS—INTERSTATE COMMERCE.—A state statute, intended to restrain the sale of nostrums, by itinerants, who profess knowledge of the art of healing in order to make sales, is not a regulation of interstate commerce, but a valid exercise of the police power of the state, and does not contravene section 8, article 1, of the federal constitution, delegating to Congress the power to regulate commerce among the several states.

STATUTES PROHIBITING SALE OF DRUGS BY ITINERANTS, WITHOUT A LICENSE, WHEN VIOLATED.—A state statute imposing a license fee of one hundred dollars per annum upon itinerant vendors of drugs or nostrums, who, by writings, or other method, publicly profess to cure or treat disease by any drug or nostrum, and prescribing a penalty, is violated where a local agent, without a license, receives an original package of medicine, shipped to him by his principal from another state, and distributes circulars issued by the principal, representing the medicine to be a cure for certain diseases, and states that the medicine sold by him is as represented in the circulars, although he does not claim to be a physician, or assume to determine the ailments of the people. Hence, as such license fee is not excessive, and the regulations reasonable, a conviction will be sustained.

Conviction for the crime of being an itinerant vendor of drugs and nostrums, and publicly professing to cure diseases and injuries, without a license. A fine of one hundred dollars was imposed, and the defendant appealed.

Pfau & Young and Whitney Brothers, for the appellant.

Milton Remley and Thomas A. Cheshire, for the state.

581 **ROBINSON, J.** The conviction of the defendant was had under section 10 of chapter 75 of the acts of the eighteenth general assembly, as amended by section 2 of chapter 137 of the acts of the nineteenth general assembly and section 3 of chapter 83 of the acts of the twenty-first general assembly, which contains the following: "Any itinerant vendor of any drug, nostrum, ointment, or appliance of any kind intended for the treatment of diseases or injury, who shall, by writing or printing, or by any other method, publicly profess to cure or treat diseases or injury or deformity by any drug, nostrum, or manipulation, or other expedient, shall pay a license of one hundred dollars per annum, to be paid to the treasurer of the commission of pharmacy. . . . Any person violating this section shall be deemed guilty of a misdemeanor, and shall, upon conviction, pay a fine of not less than one hundred and not more than two hundred dollars." In July, 1894, the defendant was engaged in the business of selling,

on commission, proprietary medicines which were manufactured in the state of Minnesota by J. R. Watkins, and were owned by him until sold. He was a resident of Minnesota, and the medicines were placed in glass bottles, securely corked, sealed, and capped, and were brought into the state, and sold in the original packages in which they were placed by the manufacturer. The medicines as prepared, and as received in this state by the defendant, were a legitimate subject of commerce, and were not injurious to the public health. They were transported by Watkins from the place where they were manufactured to Harlan, in this state, ⁵⁸² where they were received by the defendant, and there offered for sale. In making the sales he traveled from place to place with a team and wagon, and, while so engaged, sold one of the packages to one M. B. Howe, in Shelby county, in the condition in which it was sent from Minnesota. He did not at that or any other time represent himself to be a physician, nor assume to determine the ailments of the people; but he distributed printed circulars of Watkins', which represented the medicines to be a cure for certain diseases named in the circulars, and the defendant represented that the medicine sold by him was as stated in the circular. At the time the business described was carried on, and the sale specified was made, the defendant did not have a license as contemplated by the statute, nor was he a physician or registered pharmacist. At that time, Howe was a resident of this state.

The appellant contends that the acts under which he was convicted are repugnant to that part of section 8 of article 1 of the constitution of the United States, which provides that Congress shall have power to regulate commerce among the several states, and the only question we are required to determine is whether the claim thus made is well founded. The record clearly shows that it must be regarded, for the purposes of this case, as conceded that the defendant was an itinerant vendor of drugs and nostrums, without a license, within the meaning of the statutes of this state which we have set out, and that the medicines he sold were in the original packages in which they were shipped into this state. It is true that the power vested in Congress to regulate commerce among the several states is a power complete in itself to prescribe the rules by which that commerce is to be governed; that it is coextensive with the subject on which it acts, and cannot be stopped at the external boundary of a state, but enters it, and is capable of ⁵⁸³ author-

izing a disposition of articles of commerce so that they become a part of the common mass of the property within the state: *Leisy v. Hardin*, 135 U. S. 100. But it has been held that state laws which do not discriminate between residents and products of a state and those of another state—which are not designed to interfere in any manner with interstate commerce, as those which are in the nature of a simple tax upon sales of merchandise, imposed alike upon all persons, whether residents or nonresidents of the state—are not repugnant to the constitutional provision in question. Thus in *Hinson v. Lott*, 8 Wall. 148, a statute which imposed a tax of fifty cents per gallon on each gallon of spirituous liquors offered for sale in the state, to be paid by the dealer introducing it, was sustained, it appearing that a like tax on such liquors produced in the state was exacted. In *Woodruff v. Parham*, 8 Wall. 123, a tax imposed by the city of Mobile on auction sales and sales of merchandise was sustained as to sales of property brought from other states, and sold at wholesale in unbroken packages. In *Machine Co. v. Gage*, 100 U. S. 676, a statute of the state of Missouri requiring all peddlers of sewing machines, without regard to the place of growth or production of material or manufacture, to pay a tax, was sustained as against a peddler who sold machines made in Connecticut. In *Webber v. Virginia*, 103 U. S. 344, it was said that there is no objection to state legislation requiring a license for the sale of sewing machines, by reason of the grant of letters patent for the invention, when there is no discrimination against nonresidents or their agents. In *Brown v. Houston*, 114 U. S. 622, the power of a state to levy a tax on coal mined outside the state, and brought within it to be there sold, was affirmed. In *Plumley v. Massachusetts*, 155 U. S. 461, a statute of the state of Massachusetts which prohibited the manufacture and ⁵⁸⁴ sale of imitation butter, in imitation of yellow butter produced from pure, unadulterated milk, or cream of such milk, was sustained, and held to apply to the prohibited article when brought for sale from another state, where it was manufactured. Some of these cases arose under the provision of the federal constitution which forbids states, without the consent of Congress, to lay any imposts or duties on imports or exports, but all are applicable to the facts in this case. Some of the cited cases recognize the rule that state laws of the general nature of those approved are invalid so far as they discriminate in favor of the residents and products of the state, and against the residents and products of other

states. There is no discrimination in the statutes of this state under consideration. They apply alike to itinerant vendors of drugs and nostrums produced in this state, and to those which come from without it; to residents and nonresidents of the state; to those who sell their own wares, and to those who act for others. The primary object of the acts is not to derive a revenue for the use of the state, but in large part, at least, to protect its citizens against solicitations and harmful practices of irresponsible and unknown traveling vendors of drugs and other articles intended for the treatment of diseases or injury, who, in carrying on their business, publicly profess to cure or treat diseases, injuries, or deformities, and thus promote the sale of their wares to the credulous. The prohibited act may be committed without any actual sale: *State v. Bair*, 92 Iowa, 28.

That the enactment of the laws in question was within the police power of the state is affirmed in principle by numerous authorities, some of which are of long standing, and cannot now be successfully questioned. In *In re Rahrer*, 140 U. S. 545, it was said that: "The power of the state to impose restraints and burdens upon persons and property, in ⁵⁸⁵ conservation and promotion of the public health, good order, and prosperity, is a power originally and always belonging to the states, not surrendered by them to the general government, nor directly restrained by the constitution of the United States, and essentially exclusive. And this court has uniformly recognized state legislation, legitimately for police purposes, as not, in the sense of the constitution, necessarily infringing upon any right which has been confided expressly, or by implication, to the national government." The cases of *Bowman v. Chicago etc. Ry. Co.*, 125 U. S. 465, and *Leisy v. Hardin*, 135 U. S. 100, upon which the defendant relies in this case, were considered, and the fact noted that the laws on which they were based "inhibited the receipt of an imported commodity or its disposition before it had ceased to be an article of trade between one state and another, or another country and this." In *Plumley v. Massachusetts*, 155 U. S. 461, the case of *Leisy v. Hardin*, 135 U. S. 100, was again considered, and held not to be an authority for the claim that oleomargarine—a recognized article of commerce—may be introduced into a state, and there sold in original packages, without any restriction being imposed by the state upon such sale. The recent case of *Emert v. Missouri*, 156 U. S. 296, fully sustains the conclusion we now reach. That case involved the

validity of a statute of the state of Missouri which provided that no person should deal as a peddler without a license, as applied to a peddler of sewing machines manufactured in another state; and the review of the authorities, and the interpretation placed upon the constitutional provision involved, are in point.

The amount of the license fee required by the statutes under consideration is not excessive, and the regulations adopted by them are reasonable. The sale of drugs, nostrums, and other articles manufactured in another state, and brought into this state, whether ^{sss} brought into this state in original packages or otherwise, is not prohibited; but such medicines may be brought into the state and sold freely. Their importation and sale are not in any manner prohibited. But if its owner select as its agent an itinerant, who, to promote sales, publicly professes to cure and treat diseases, injuries, and deformities, it is proper that some evidence and guaranty of his responsibility be required. It was said in *Brown v. Maryland*, 12 Wheat. 443, that this right of sale may very well be annexed to importation, without annexing to it, also, the privilege of using the officers licensed by the state to make sales in a peculiar way." So it may be said in this case that the right to sell, in original packages, medicines brought into this state from another, does not include the right to have it sold by an unlicensed itinerant, who, to make sales, professes knowledge of the art of healing. The statutes which apply to such sales are not, in any sense, regulations of interstate commerce, but a reasonable exercise of the police power of the state, which may be applied as well to articles of interstate commerce in the hands of the vendor, and offered for sale in the original packages, as to articles produced within the state.

We conclude that the judgment of the district court is right, and it is affirmed.

POLICE POWER—IMPOSITION AND FRAUD.—One of the undoubted subjects of the police power is the protection of the public from imposition and fraud: See monographic note to *People v. Wemple*, 27 Am. St. Rep. 565, on the constitutionality of state regulations of interstate commerce. Laws providing for the detection and prevention of fraud are, as a general proposition, free from constitutional objection: *People v. Wagner*, 36 Mich. 594; 24 Am. St. Rep. 141, and note.

OTTUMWA v. ZEKIND.

[95 IOWA, 622.]

MUNICIPAL CORPORATIONS—ORDINANCE REQUIRING "TRANSIENT MERCHANTS" TO PAY A LICENSE.—The term "transient merchant," in an ordinance requiring a license fee from all transient merchants no matter where they reside, relates to the character of the business carried on, and has no reference to the residence of the individual; and such an ordinance is uniform in its operation, is not class legislation, and is not a discrimination in favor of resident merchants.

MUNICIPAL CORPORATIONS—ORDINANCE REQUIRING "TRANSIENT MERCHANTS" TO PAY A LICENSE—REASONABLENESS.—Municipal authority, given by statute, "to regulate and license" sales made by transient merchants, does not authorize a city ordinance requiring transient merchants to pay a license fee of two hundred and fifty dollars per month, or twenty-five dollars a day, if the license is issued only for a short period, and such ordinance is, therefore, void for unreasonableness.

Conviction, under a city ordinance, for selling goods as a transient merchant, without having paid the license fee required. The defendant appealed.

Steck & Smith, for the appellant.

W. W. Epps, city solicitor, for the appellee.

622 **DEEMER, J.** The ordinance under which defendant was convicted reads as follows:

623 "Section 1. Transient merchants selling, or in any manner offering for sale, any goods, wares, or merchandise, within the city of Ottumwa, Iowa, at auction or private sale, shall pay two hundred and fifty dollars per month as a license therefor, or twenty-five dollars per day, if such license is issued for a short period.

"Sec. 2. Any transient merchant selling either at public auction or private sale, whether holding auctioneer's license or not, shall be deemed a transient merchant.

"Sec. 3. Any person required by this ordinance to procure a license and failing to do so shall be fined in any sum not less than five dollars, nor more than fifty dollars and costs. Any person continuing business under an expired license shall pay a like fine and costs, and all persons so convicted and fined shall be imprisoned until the fine and costs are paid or until discharged by due course of law."

This ordinance was enacted in virtue of the power conferred upon cities of the first class by section 621 of McClain's Code

(Code 1873, sec. 462), which is as follows: "They shall have power to regulate and license sales by auctioneers and transient merchants within their corporate limits, provided, that the exercise of the power shall not interfere with sales made by sheriffs, constables, coroners, marshals, executors, guardians, assignees of insolvent debtors or bankrupts, or other persons required by law to sell real or personal property."

The case was tried in the lower court upon an agreed statement of facts, the substance of which was, that on December 15, 1894, one B. E. Myers shipped to the city of Ottumwa, from Marshalltown, a stock of ready-made clothing, and placed the same in a store building on one of the main business streets, where he offered it for sale. Defendant was an ⁶²⁴ employé of Myers, and, as such, made sales from said stock at retail, in the usual course of trade. Defendant was also manager of the business. It was the intention that the business should be carried on only for such length of time as was required to sell the stock, which was valued at six thousand dollars. Myers and Zekind are residents of Marshalltown, and neither has paid the license required by the ordinance before quoted. It is also agreed that no resident merchant of the city of Ottumwa is required, by any ordinance of the city, to pay a license. The power of the legislature to delegate to a municipality the right to regulate and license auctioneers and transient merchants is not denied. But it is insisted that the ordinance is invalid for the following reasons: 1. Because it discriminates in favor of resident merchants of the city of Ottumwa, and against nonresident merchants; 2. Because it discriminates in favor of one class of merchants, and against another class, engaged in the same business; 3. Because it imposes a license which is unreasonable, unjust, and oppressive; 4. Because it is indefinite and uncertain as to the persons intended to be included in the words "transient merchants."

1. With reference to the first objection insisted upon, it is sufficient to say that the ordinance does not, in terms, discriminate in favor of resident merchants of the city of Ottumwa. It requires a license fee from all transient merchants, no matter where they reside, and imposes a penalty upon the resident, should he become a transient merchant. We do not understand that the term "transient merchant" has reference to the residence of the individual. It more properly relates to the character of the business carried on by him. In the case of *Pacific Junction v. Dyer*, 64 Iowa, 38, relied upon by appellant, the ⁶²⁵ ordinance held

to be invalid defined a transient merchant to be "every nonresident person who shall sell, exchange, or dispose of any goods, wares, or merchandise of his own or of other nonresident owners." This ordinance was declared to be unconstitutional because it discriminated in favor of resident merchants of Pacific Junction, and against other resident merchants of Iowa. In the case at bar no such discrimination appears on the face of the ordinance, and the fact that no resident merchants are required by the city to pay a license is not controlling.

2. It is said, however, that, if the words "transient merchant" should be held to include resident merchants of the city of Ottumwa who might temporarily engage in business, the ordinance is unconstitutional, because it is not uniform in its operation, and because it grants to certain citizens, or classes of citizens, privileges or immunities which do not belong equally to all. This objection is not tenable. The ordinance makes no exceptions in favor of or against anyone carrying on the business. All transient merchants must pay the fee before engaging in the business. Under numerous decisions of this and other courts, it is uniform in its operation, and is not class legislation: See *Iowa etc. Land Co. v. Soper*, 39 Iowa, 112; *McAunich v. Mississippi etc. R. R. Co.*, 20 Iowa, 338; *Mt. Pleasant v. Clutch*, 6 Iowa, 546.

3. It is contended that a license fee of two hundred and fifty dollars per month, or twenty-five dollars per day for a short period of time, exacted from transient merchants is prohibitory, unreasonable, and unjust, and is a manifest exercise of the taxing power, rather than a police measure. The statute confers upon the municipality the power to "regulate and license auctioneers and transient merchants," and we are required to determine what may be exacted by the corporation as a fee for permission to ^{and} carry on business as a transient merchant. A license must be distinguished from a tax. The power to tax is one of the highest attributes of sovereignty, and, if delegated by the legislature to the municipality, such delegation must be in express terms, or by necessary implication, and cannot be implied from such general authority of power as "to license and regulate": *Burlington v. Putnam Ins. Co.*, 31 Iowa, 103; *State v. Herod*, 29 Iowa, 123; *Burlington v. Bumgardner*, 42 Iowa, 673; *State v. Smith*, 31 Iowa, 493; *Cooley on Taxation*, 1st ed., 387; *Clark v. Davenport*, 14 Iowa, 494; *Davenport v. Mississippi etc. R. R. Co.*, 12 Iowa, 539; *Dillon on Municipal Corporations*,

4th ed., secs. 357, 358; 13 Am. & Eng. Ency. of Law, 532. The municipality, under the authority given it to license, had the right to impose such a charge as would cover, not only the necessary expenses of issuing it, but also the additional labor of officers, and other expenses imposed by the business, but nothing beyond this. As said in *Burlington v. Putnam Ins. Co.*, 31 Iowa, 103, "Licenses are a part of the police regulations of a city, and should be charged for as such, and only to such extent as may reasonably compensate the city for issuing and enforcing the licenses, and for the care exercised by the city under its police authority over the particular person licensed": See, also, *State v. Herod*, 29 Iowa, 123; *Beach on Public Corporations*, sec. 1255. The amount of the license fee or charge is to be considered, in determining whether the exaction is not really one of revenue or prohibition, instead of one of regulation under the police power. The charge made will be presumed to be reasonable, and within the authority conferred upon the municipality, unless the contrary appears upon the face of the ordinance, or is, by evidence, shown: *Burlington v. Putnam Ins. Co.*, 31 Iowa, 103; *Van Baalen v. People*, 40 Mich. 258; *Atkins v. Phillips*, 26 Fla. 281; *Van Hook v. Selma*, 70 Ala. 361; 45 Am. Rep. 85; *Beach on Public Corporations*, sec. 1255. The fee ³³⁷ charged by the ordinance of the city of Ottumwa was two hundred and fifty dollars per month, or twenty-five dollars per day for a shorter period of time. It seems to us, in view of the nature of the business licensed, the fact that it was in no manner injurious to the public health or morals, that it was confined to a particular place, and was not of such a nature as to become a nuisance, that it did not require the police supervision, and was in no manner calculated to disturb the peace and quietness of the city, that it is perfectly apparent that the fee exacted in this case was not required as a police regulation, but for the purpose of revenue to the city. It may also have been fixed at this sum to protect, in a measure, the home merchant against the passing one, who otherwise might not be called upon to pay anything to the support of the instrumentalities of government. But such protection, however desirable and just, cannot be afforded under an ordinance passed in virtue of authority given by the state to regulate and license. In passing, we may observe that a comparison of the language used in sections 462 and 463 of the code clearly demonstrates that the legislature did not intend, by section 462, to confer upon municipalities the right to tax transient

merchants, by the use of the words "regulate and license." Our conclusions are supported by the following cases: *Brooks v. Mangan*, 86 Mich. 576; 24 Am. St. Rep. 137; *Mankato v. Fowler*, 32 Minn. 364; *Sipe v. Murphy*, 49 Ohio St. 536; *Jackson v. Newman*, 59 Miss. 385; 42 Am. Rep. 367.

The case of *Decorah v. Dunstan*, 38 Iowa, 96, is relied upon as an authority in support of the validity of the ordinance. In that case the ordinance provided that the fee for the license "shall be not to exceed twenty dollars for the first day of such license, and twenty dollars for each subsequent day included in such license." The exact amount to be charged was apparently left to the discretion of the mayor, and the court says (Cole J., ^{case} writing the opinion): "Nor do we regard it as being in restraint to trade, or unreasonable or oppressive": Citing *State v. Herod*, 29 Iowa, 123. There are several reasons why we do not regard this as conclusive of the question. The defendants in that case were auctioneers, and not transient merchants. The fee charged an auctioneer may well be larger than that imposed upon a transient merchant, on account of the character of the business, and the greater necessity for supervision over the auctioneer. Again, there was no showing that the fee demanded of defendants in that case was an unreasonable one. Under the ordinance the mayor could have fixed it at any sum under the rates named. Defendants had no license, and were prosecuted for not having obtained one before commencing their business. There was no showing of an unreasonable exaction. Moreover, the question presented in this case, even if determined in that, was not well considered. The whole matter is disposed of in less than two lines, and the authority cited in support of the rule is really against it: See the case before cited in 29 Iowa. And, lastly, the case, on all other points, has been practically overruled in *Pacific Junction v. Dyer*, 64 Iowa, 38; *Marshalltown v. Blum*, 58 Iowa, 184; 43 Am. Rep. 115; *State Center v. Barenstein*, 66 Iowa, 249.

Some other questions are presented by counsel, but, in the view we have taken of the case, they are immaterial, and will not be noticed. Our conclusion is, that the ordinance exacts an unreasonable fee, and the judgment is reversed.

MUNICIPAL CORPORATIONS—LICENSE.—AN ORDINANCE exacting a license fee of ten dollars from all persons engaged in selling merchandise is valid: *van Hook v. Selma*, 70 Ala. 301; 45 Am. Rep. 85. Compare *State v. French*, 109 N. C. 722; 26 Am. St.

Rep. 590. A state may exact a license fee from persons carrying on business within its territory, without rendering its action in so doing subject to the objection that it is attempting to regulate interstate or foreign commerce, provided it does not discriminate in favor of its people, products, or manufactures, nor charge persons importing articles of commerce within the state for the privilege of there disposing of them: See monographic note to *People v. Wemple*, 27 Am. St. Rep. 561, on the constitutionality of state regulations of interstate commerce. An ordinance prohibiting all persons from engaging in the business of peddling without a city license, and fixing the price of such license at a figure so high as to make the ordinance amount to a prohibition and destruction of such business, is valid so long as it operates upon all persons impartially; but if it exempts all residents of the city from its operation, it is void, because it then becomes a trade regulation discriminating against nonresidents: *Sayre Borough v. Phillips*, 148 Pa. St. 482; 33 Am. St. Rep. 842. A statute relating to the manner of sale, and not the right, is a valid exercise of police power: *Commonwealth v. Gardner*, 133 Pa. St. 284; 19 Am. St. Rep. 645.

TYLER v. COULTHARD.

[95 IOWA, 705.]

EXECUTION—EXEMPTIONS—"ABSTRACT BOOKS."—The books of an abstracter of titles, and other property used in connection therewith, are not exempt from execution, under a statute allowing an exemption to a "farmer, mechanic, surveyor, clergyman, lawyer, physician, teacher, or professor," as he does not come within any class of the persons named.

APPEAL—WHAT CANNOT BE FIRST RAISED UPON.—That there was a waiver, by answering over after the overruling of a demurrer, is an objection which cannot first be urged on appeal.

Action by the plaintiff, Tyler, against the defendant, Coulthard, to recover certain personal property, or the value thereof, and damages for an alleged wrongful and illegal seizure of the same by the defendant sheriff, Coulthard, upon certain executions against the plaintiff. The action was based on the ground that the property was exempt from execution. There was a verdict for the plaintiff, but a motion for a new trial, and in arrest of judgment, was sustained, and the plaintiff's petition was dismissed, whereupon he appealed.

J. S. Dewell and L. R. Bolter & Sons, for the appellant.

J. W. Barnhart and Roadifer & Arthur, for the appellee.

THE ROTHROCK, J. The order sustaining the motion in arrest and for a new trial is as follows: "It is hereby ordered that the motion in arrest and for a new trial be sustained; and this disposing of the whole matter in controversy, for the reason that the court finds that the property is not exempt, as claimed by the plaintiff, the petition of the plaintiff is hereby dismissed."

It will be observed that the order of the court disposed of the case, and that the important question to be determined upon this appeal is whether, as matter of law, the property was liable to execution for the debts of the plaintiff. The property consisted of a set of books known as "abstract books," from which abstracts of the titles of real estate in Harrison county are made up, and also an iron safe, desk, chairs, and a supply of blank abstracts, and other articles used in the office of an abstracter of titles. The plaintiff was the owner of the property, and is a married man and the head of a family, and, before and at the time of the levy, his occupation was ⁷⁰⁷ to make abstracts of titles, and he used the books and other property for that purpose.

1. The sole question is, whether the books of an abstracter of title, and the other property used in connection therewith, are exempt under our statute of exemptions, which, so far as it relates to the question under consideration, is as follows: "If the debtor is a resident of this state and is the head of a family, he may hold exempt from execution the following property: The proper tools, instruments, or books of the debtor if a farmer, mechanic, surveyor, clergyman, lawyer, physician, teacher, or professor": Code. sec. 3072. If the property in question is exempt under the law, it must appear that the debtor is one of the classes of persons named in the statute. It is averred in the petition that the plaintiff is a mechanic, and that he habitually earns his living by compiling and arranging and making abstracts of title, and that the property in controversy consists of the necessary tools, books, and instruments by the use of which he obtains a living for himself and family. It is apparent that the plaintiff does not come within any other class of persons named in the statute. That proposition is too plain for discussion. And, in our opinion, there is but little more reason for holding that the occupation of the plaintiff is that of a mechanic. In the common acceptance of the meaning of the word, to designate an abstracter of titles as a "mechanic" would be regarded, to say the least, as a very inaccurate form of speech. A mechanic is defined by Webster to be "one who works with machines or instruments; a workman or laborer other than agricultural; an artisan; an artificer; more specifically one who practices any mechanic art; one skilled or employed in shaping and uniting materials, as wood, metal, etc., into any kind of structure, machine, or other object requiring the use of tools or instruments." ⁷⁰⁸ It is true, as claimed by counsel for appellant,

that courts construe exemption statutes liberally, to the end that they may be carried out in their object and spirit. We need not cite the numerous cases decided by this court in which that principle is announced. But we are aware of no authority for carrying this rule to the extent of adding an exempted class of persons to those enumerated in the statute. Appellant relies very much upon the case of Davidson v. Sechrist, 28 Kan. 324. But the statute of Kansas exempts the necessary tools and instruments of any mechanic, miner, "or other person" "used in his trade or business." That statute, by the general term "other persons," includes all kinds of occupations, and the decision in that case did not include a class of persons not named in the statute. It appears to us it is not necessary to further consider this question.

2. All of the proceedings in this case were had before the same judge. There was a demurrer to the petition, which raised the question that the property in controversy was not exempt from execution. The demurrer was overruled, and an exception was entered of record. Two days after the demurrer was overruled, an answer was filed, and in one ground of defense the defendant raised the same question. The case was then tried to a jury, and, at the close of the introduction of the evidence, the defendant moved the court to instruct the jury to return a verdict for defendant, on the ground that the property was not exempt from execution. This motion was overruled, and the court instructed the jury that the property was exempt. It is strenuously contended in behalf of appellant that, when the defendant pleaded over after his demurrer was sustained, the ground of demurrer was abandoned and adjudicated, and that the question could not again be presented in the ⁷⁰⁹ form of an answer. Much of the argument of counsel is devoted to this question, and reliance is especially placed upon the cases of Kissinger v. Council Bluffs, 73 Iowa, 171, and Wing v. District Tp., 82 Iowa, 632. In both of these cases, the defendant was appellant, and, after the demurrer to the petition was overruled, there was an answer over, and the plaintiff attacked the answer on the ground that the question raised thereby had been determined on demurrer. From a ruling on the demurrer or motion to strike from the answer, the defendant appealed. Other decisions of this court are cited as sustaining the contention of plaintiff, but they were cases where the question of pleading was raised in the court below. In the case at bar no objection appears to have been made

to the answer by demurrer, motion, or otherwise. The case went to trial upon the answer, and the question of the ruling on the demurrer was in effect waived. We discover no reason why it was not competent for the court, under the state of the pleadings, to change his rulings upon the pleadings at any time during the pendency of the action. That such a course of procedure is not error, see *Standish v. Dow*, 21 Iowa, 363; *Jenkins v. Shields*, 36 Iowa, 526; *Norton v. Knapp*, 64 Iowa, 112.

The case demands no further elaboration, and the judgment of the district court is affirmed.

EXECUTION.—A SET OF ABSTRACT BOOKS, and indexes, made by the judgment debtor are subject to execution under a statute declaring that all property, real and personal, of the judgment debtor, not exempt by law, shall be liable to execution: *Washington Bank v. Fidelity Abstract etc. Co.*, 15 Wash. 487; 55 Am. St. Rep. 902.

APPEAL.—OBJECTION not made in the trial court will not be considered on appeal: *Coad v. Home Cattle Co.*, 32 Neb. 761; 29 Am. St. Rep. 465.

HUNTER v. HUNTER.

[95 IOWA, 728.]

DOWER—WHEN TAKING UNDER WILL DOES NOT DEFEAT.—A widow may take a life estate under her husband's will without defeating her right of dower, which must be allowed to her, unless it would be inconsistent with the will, and such allowance is not inconsistent where the will devises a life estate with a remainder over, has no express provision prohibiting the taking of dower, and contains no statement that the provision made is intended to be in lieu of that made by law.

DOWER—ESTATE BY WILL—ELECTION—RIGHTS OF HEIRS.—If a homestead is embraced within a farm which contains other lands, and a widow is given, by her husband's will, a life estate in the entire farm, her occupancy of the homestead is consistent with the life estate given by will, and is not an election to take the homestead instead of such life estate. She has a right to take under the will and also her dower, and her failure to have her dower set apart to her during her lifetime will not prevent her heirs from receiving the same after her death.

Milton, Remley and Hedges & Rumble, for the appellants.

Baker & Ball and Ranck & Wade, for the appellees.

729 **KINNE, J.** 1. Owing to the numerous pleadings filed in this case, and the condition of the record, it is difficult to ascertain the exact condition of the case. It appears that originally the plaintiffs and the defendant James Hunter appealed; that afterward Lemuel Hunter, defendant, served notice of appeal.

In appellees' argument, it is said that plaintiffs' appeal has been dismissed, and that James Hunter is now the only party appealing from the decree. We find nothing in the record or papers submitted to us showing such to be the fact. So far as the record shows, the appeal is prosecuted by plaintiffs and the defendant James Hunter, and the case will be so treated. Inasmuch as appellees' counsel, in argument, do not claim that Lemuel Hunter has appealed, and no argument is filed on his behalf as an appellant, but only as an appellee, his appeal will be treated as abandoned. We shall endeavor to state the issues between the parties, eliminating therefrom all pleadings for which substituted pleadings were filed, as well as all rulings which were not relied upon by the parties, or which were waived by the filing of subsequent pleadings.

It appears that one Adam Hunter died testate in Johnson county, Iowa, in December, 1876, leaving the following children and heirs at law, viz: John C. Hunter, Joseph Hunter, Nancy Hill, Margaret Teneick, Mary Smith, Lemuel Hunter, George Hunter, James Hunter, and Rachael Hunter. Plaintiffs and defendants Lemuel Hunter, George Hunter, and James Hunter are children and heirs at law of Adam Hunter. Defendant Elizabeth Hunter, the widow of Adam Hunter, deceased, was of unsound mind when this action ^{was} commenced, and George Hunter was the guardian of her person and property. She died on February 6, 1890. Rachael Hunter died on October 13, 1884, and within ten years after the death of her father, Adam Hunter. Adam Hunter, during his lifetime, executed his last will and testament, which was duly probated. So much of said will as is material to the matter in controversy reads as follows: "After the payment of the expenses of my obsequies, and debts of whatsoever kind, I do hereby give and bequeath unto my beloved wife, Elizabeth Hunter, to have and to hold during her natural life for the support of herself and my beloved daughter Rachael, all that tract or tracts of land comprising the farm on which I now reside and at the death of said Elizabeth said farm is to go to my beloved son Lemuel Hunter in fee; but, if my daughter Rachael survive said Elizabeth, said Lemuel shall pay said Rachael the sum of two hundred dollars per year for her support. If said Rachael should die within ten years after my decease, he, said Lemuel, shall pay the sum of sixteen hundred dollars to the remaining heirs, each of whom shall share and share alike in the said sum last aforesaid." By the further provision of the

will the wife was given a certain other tract of land, subject to the right of William Teneick to purchase it within three years upon the payment to said widow of one thousand dollars. The will also gave the following sums in money to the several children of the deceased, viz., to Nancy Hunter, John C. Hunter, Margaret Teneick, Mary Smith, and George Hunter, one thousand dollars each, and to James Hunter and Joseph Hunter twelve hundred dollars each. To his wife the testator also gave in fee his interest in certain Missouri lands, and also all the residue of his estate, real and personal. The will nominated the wife, George Hunter, and Lemuel Hunter as executors. On March 20, 1877, the persons thus nominated were appointed by ⁷³¹ the court as such executors, and accepted the trust, and served until discharged upon final settlement of the estate in March, 1879. In November, 1889, and while Elizabeth Hunter was of unsound mind, her guardian filed a petition in the probate court of Johnson county, Iowa, asking for authority to consent on behalf of his ward to the terms of the will of Adam Hunter, or that the court, acting instead of his ward, so consent, and make the same of record, which consent, after a hearing, was given, and made of record. It appears that when the estate of Adam Hunter was settled, Elizabeth Hunter receipted to the executors in full, and asked that they be discharged. It also appears that by the terms of the will she received from the residue of the personal estate over eleven thousand dollars. By a proper pleading filed, defendant James Hunter took issue with his codefendant Lemuel Hunter.

2. Many pages of argument are used in discussing questions relating to the pleadings. We do not deem it essential to pass upon the matters thus presented, as we understand the issues as finally made, and upon which the trial was had, to present the question as to whether or not Elizabeth Hunter, testator's widow, was possessed of an undivided one-third of the premises in question by right of dower in her husband's estate; in other words, whether she could take under the law and also under the will of her husband. The determination of this question may involve a consideration of the effect of the proceedings in probate, whereby the court undertook to exercise an election for Elizabeth Hunter to accept the provisions of her husband's will; whether, under the circumstances, any election was required; and whether the acts of said Elizabeth prior to the time she

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became of unsound mind should be held to constitute an acceptance of the provisions of the will, to the exclusion of her dower right. It is well settled in this state by a long line of decisions ⁷³² of this court that a widow may take a life estate under a will, and also her distributive share, or dower, under the law, in the same real estate. This rule is not controverted by appellees, but it is urged with great ability that the facts in the case at bar do not bring it within the rule mentioned. If we were at liberty to determine this question, uninfluenced by previous adjudications, it may be we should feel constrained to reach a conclusion contrary to that which, under the circumstances, we feel compelled to announce. We shall not undertake to refer to, much less discuss, all of the many cases touching this question heretofore passed upon by this court. We refer to some of them wherein the facts are so near like those in the case at bar as to, in our judgment, require an application of the same rule. We have said that the rule in this state is that the widow may take under the will and under the law. The rule is broader, even, than that, and is that, in the absence of provisions to the contrary in the will, dower must be allowed unless to do so would be "inconsistent with and will defeat some of the provisions of the will": *Daugherty v. Daugherty*, 69 Iowa, 679, and cases therein cited; *Parker v. Hayden*, 84 Iowa, 495; *Richards v. Richards*, 90 Iowa, 606. This inconsistency must be such as to disturb, defeat, interrupt, or disappoint some provision of the will: *Corriell v. Ham*, 2 Iowa, 557. In *Sully v. Nebergall*, 30 Iowa, 340, the devise was for life, or as long as she remained his widow, and at her death, or on her marriage, the estate was to be equally divided between the testator's heirs. It was held that the widow's election to take under the will did not defeat her right of dower. In *Metteer v. Wiley*, 34 Iowa, 214, the provision was in substance the same. *Watrous v. Winn*, 37 Iowa, 72, was a like case, and the decision was the same: *Potter v. Worley*, 57 Iowa, 67. In ⁷³³ *Parker v. Hayden*, 84 Iowa, 495, and *Daugherty v. Daugherty*, 69 Iowa, 679, under similar facts, the holding was the same. It seems to us the facts in the case at bar clearly bring it within the rule of the cases we have cited. We have carefully examined the cases of *Severson v. Severson*, 68 Iowa, 656, *Kyne v. Kyne*, 48 Iowa, 21, *Snyder v. Miller*, 67 Iowa, 261, *Van Guilder v. Justice*, 56 Iowa, 669, *Cain v. Cain*, 23 Iowa, 31, and other cases cited by appellees, and which it is

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contended are controlling in the case now before us, but we think there is no ground for claiming that the holdings in these cases should be controlling in the case at bar. In all of them it was held that the widow could not take dower and also take under the provisions of the will, because such taking was contrary to the intention of the testator, and also inconsistent with the provisions of the will. An examination of these and other cases relied upon by appellees will show that in most of them the facts were much different from those we have to deal with. In *Severson v. Severson*, 68 Iowa, 656, the testator had intended to devise absolutely his real estate, two-thirds to his wife and one-third to his daughter. It was not a case of a devise for life with a remainder over to the daughter. If the widow had been permitted to take dower, she would have taken practically all of the land. In *Snyder v. Miller*, 67 Iowa, 261, the will gave the widow certain real estate in fee simple. It then provided for the payment of certain legacies, and that the residue of all the testator's property, both real and personal, should be divided equally among his children, and that the real estate not otherwise disposed of should be sold, and converted into money, and distributed as provided in the will. Dower was not allowed in addition to the provision made for the widow in the will, as to have allowed it would have been inconsistent with the will, which provided for the sale of the land, and the distribution of the proceeds. ⁷³⁴ It is urged that this case is, in principle, like that at bar. One fact which distinguishes the two cases is that in *Snyder v. Miller*, 67 Iowa, 261, there was a provision for the sale of land and the distribution of the proceeds arising therefrom, which would be defeated by allowing the widow to take under the will and also under the law. The facts in the other cases relied upon are so unlike those in the case at bar that the holding in them is not controlling in this case. Here we have a case where there is no express provision in the will prohibiting the taking of dower; no statement therein that the provision made is intended to be in lieu of that made by law. It may be conceded that these cases are to be determined largely upon the facts in each case, and that sometimes not much aid is derived from the adjudicated cases. We are unable to discover any such difference in the facts in the cases we have cited and those in the case at bar as would justify us in ignoring them as controlling in the determination of this question. Following these cases, we must hold that the

widow might, in this case, take under the will and also under the provisions made by the law for her.

3. This court held, on an appeal from the ruling of the district court accepting under the will for the ward, Elizabeth Hunter, that, inasmuch as no notice of the proceedings was served upon the ward, that court was without jurisdiction in the matter: *In re Hunter's Estate*, 84 Iowa, 388; hence, no election to accept under the will was legally made for the widow. It is urged, however, that prior to the time the widow became of unsound mind her acts were such as that she should be held to have elected to accept under the will, and that such acceptance would bar her right to dower. This contention of appellees, however, is based upon the further claim that there is an inconsistency in taking under the will and in claiming dower. ⁷³⁵ We have already held that there was no such inconsistency under the facts of this case, and under such circumstances no election to take under the provision of a will, either expressly or impliedly from acts done, will bar the widow from taking under the will and also from claiming dower: *Metteer v. Wiley*, 34 Iowa, 215; *Potter v. Worley*, 57 Iowa, 67.

4. Appellees claim that, as the land in controversy embraced the homestead of the said Adam Hunter and Elizabeth Hunter, and the same was so used by her up to her death in 1890, and she had never made an application to have her distributive share in the farm set off to her, she had thereby elected to retain the homestead for life in lieu of such distributive share under the statute, and she is now estopped from claiming such distributive share. We do not think this claim is well founded. The widow, under the will, took and held the home farm for life. This farm embraced more land than the homestead. Her living on and occupying the land and dwelling-house which had been the family house was entirely consistent with the possession and use given her by the life estate vested in her by the will, which, as we have said, embraced the homestead and other land. Her homestead right would be but a life estate in the homestead proper. The provision of the will gave her this, and more, for it gave her a life estate in the entire farm, including the homestead. We do not discover that under such circumstances her occupancy of the homestead can be held to be an election to take the homestead, rather than the life estate provided in the will. As we have already held, the widow had the right to take under the will and also her dower, and her failure to have her dower set

apart to her during her lifetime will not prevent her heirs from receiving the same after her death: *Potter v. Worley*, 57 Iowa, 67. In view of our holding, the decree of the lower court was wrong. It ⁷³⁶ should have quieted title in Lemuel Hunter, as against plaintiffs and James Hunter, to the undivided two-thirds of the land described in Lemuel Hunter's cross-bill, and have decreed that the sums found due the plaintiffs and James Hunter from Lemuel Hunter be made liens upon said undivided two-thirds of said land. Such decree will, if plaintiffs and James Hunter so elect, be entered in this court.

Reversed.

DOWER—IN ADDITION TO TAKING BY WILL—ELECTION—HOMESTEAD.—Dower cannot be barred by the provisions of a will, and the widow may take in both ways, unless such provisions are expressly stated to be in lieu of dower, and are accepted by the widow in lieu of dower: *Hall v. Hall*, 8 Rich. 407; 64 Am. Dec. 758; *Lewis v. Smith*, 9 N. Y. 502; 61 Am. Dec. 706; *Braxton v. Freeman*, 6 Rich. 35; 57 Am. Dec. 775; *Church v. Bull*, 2 Denio, 430; 43 Am. Dec. 754; or, unless her claim to dower would defeat the provisions in the will: *White v. White*, 1 Harr. 202; 31 Am. Dec. 232; note to *Theall v. Theall*, 26 Am. Dec. 503; *Church v. Bull*, 2 Denio, 430; 43 Am. Dec. 754. In Missouri, it is held that if a husband by will devises real estate to his wife, which she accepts, it must be taken in lieu of dower out of the lands of which she died seised, unless by his will he otherwise declared: *Kaes v. Gross*, 92 Mo. 647; 1 Am. St. Rep. 767. A widow cannot be barred of her dower by a devise of an estate for years: *Wiseley v. Findlay*, 3 Rand. 361; 15 Am. Dec. 712. A devise or bequest to a widow is presumed to be in addition to her dower, unless it clearly appears that it was the intention of the testator that it was to be in lieu thereof. She has, therefore, a right to both a homestead and dower. If she, being a devisee under her husband's will, occupies with her children, and carries on the farm in which she claims a homestead for several years after her husband's death, without having either her homestead or dower set out to her, she is not thereby deprived of the right to both homestead and dower in her husband's estate: *Hatch's Estate*, 62 Vt. 300; 22 Am. St. Rep. 109, and note.

CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

MORAN v. MORAN.

[106 MICHIGAN, 2.]

THE DEED OF AN INSANE PERSON whose incompetency has not been adjudicated is not void, nor can it be avoided in an action of ejectment, nor otherwise than by a suit in equity.

AN INSANE PERSON WHOSE INCOMPETENCY HAD NOT BEEN ADJUDICATED when he executed a deed cannot avoid it without first doing equity.

James H. Pound, for the appellant.

Edwin F. Conely and Orla B. Taylor, for the appellees.

^s **LONG, J.** This is an action of ejectment commenced for the purpose of recovering possession of certain lands, and of setting aside a deed given by plaintiff to defendant William B. Moran's grantor, on the ground that plaintiff was incompetent to execute the deed at the time it was ^s given. On the trial in the court below, counsel for plaintiff offered to show that, "from 1874 up to the year 1886, the plaintiff was a totally incompetent person mentally on the subject of property and property dealings; that in 1874 he was possessed in fee simple of the land described in the declaration, and that he never in any lucid interval executed any conveyance or divested himself of that title; that he was adjudged formally an incompetent person in the year 1887, and subsequent to the making of the deeds from plaintiff to George Hendrie, and from Hendrie to defendant, said Hendrie acting for defendant; that plaintiff intends to offer evidence tending to show to this jury that, at the time of the making of this deed to George Hendrie (April 5, 1882), he was such an incompetent person, and that the present defendant was well aware

of these facts; that we are unable to tell what money plaintiff received, if any, with the exception of what has been already testified to by plaintiff's daughter; and that the defendant William Chauvin was simply the tenant in possession of Mr. Moran, defendant, and is made a defendant because the statute requires it; that so far as the facts and merits on which plaintiff's case is based, we rest upon the fact that plaintiff, Moran, was incompetent to convey property at the time it is claimed that the deed was made by him to George Hendrie, through whom the defendant William B. Moran claims title; that the deed so given was and is an absolute nullity."

After this offer of evidence was made, the court directed a verdict in favor of defendants, on the ground that the proceedings to set aside this deed should be in equity, and not in an action at law.

The facts, so far as developed on the trial, are that on December 13, 1872, the plaintiff and defendant Moran purchased private claim 696 for six thousand dollars; that title was taken in the name of defendant. A division was thereafter made of the tract, plaintiff taking the east half. He at once went into possession with his family, and remained there until about April 5, 1882, when he sold to George Hendrie, and three days later Hendrie sold to defendant Moran. The consideration named in the deed¹⁰ from plaintiff to Hendrie was seven thousand five hundred dollars. Upon the trial, plaintiff's counsel stated that he had no evidence upon the question as to whether this consideration was paid, except the cross-examination of defendant. The place was mortgaged for about four thousand five hundred dollars. The testimony of plaintiff's daughter shows that plaintiff's wife applied for a divorce from him in the latter part of the year 1881. The sale of the farm was made about the time the divorce proceedings were concluded, and Mrs. Moran got about nine hundred dollars; and it is claimed that plaintiff must have realized something from the sale, as he traveled most of the time after that for the next two or three years. The plaintiff returned to Grosse Pointe, and remained until November 29, 1887, when a guardian was appointed over him as an incompetent, and he was sent to the Retreat at Dearborn.

The only question raised is, whether the remedy of plaintiff is in equity. It is not disputed that the deed was given as claimed, and imports the consideration named: and it also appears that the four thousand five hundred dollars mortgage was paid off, and

Mrs Moran had nine hundred dollars of the purchase money; and counsel insist that it is apparent that the plaintiff had quite a considerable sum of money from the sale. The sole reason for avoiding the deed is, that at the time it was given, the plaintiff was incompetent to make it. No guardian had been appointed over him at that time, and none was appointed until 1887. As a record title the deed of defendant is perfect; but plaintiff's counsel insists that, while a court of equity might set aside the deed, yet the question is one which is triable in a court of law, before a jury, as well.

We cannot agree with this contention. The record shows conclusively that no adjudication was had upon the incompetency of the plaintiff until after the deed had been executed. The deed was not therefore absolutely void, but voidable: *Wait v. Maxwell*, 5 Pick. 217; 16 Am. Dec. 391; *Ingraham v. Baldwin*, 9 N. Y. 45; *Carrier v. Sears*, 4 Allen, 336; 81 Am. Dec. 707; *Hallett v. Oakes*, 1 Cush. 296; *Chew v. Bank of Baltimore*, 14 Md. 11 299; *Hovey v. Hobson*, 53 Me. 453; 89 Am. Dec. 705; *Breckenridge v. Ormsby*, 1 J. J. Marsh. 236; 19 Am. Dec. 71; *Nichol v. Thomas*, 53 Ind. 42; *Eaton v. Eaton*, 37 N. J. L. 108; 18 Am. Rep. 716. There is not an unanimity of opinion when the deed is merely voidable on the question of the necessity of restoring the purchase money, and placing the grantee in the same position that he occupied before the execution of the deed, in cases where the grantee acted without notice of the grantor's insanity and in good faith. In this state, however, the question is settled that an incompetent person, under such circumstances, is bound to do equity: *Gates v. Cornett*, 72 Mich. 420.

It is not insisted in the present case that the defendant should be placed in statu quo, as a condition precedent to the commencement of suit; but it is insisted that plaintiff should place himself in that tribunal which, if it finds the deed voidable, and avoids it, can still make the amount paid a lien upon the land. In *Gates v. Cornett*, 72 Mich. 420, this court set aside the contract, but made the amount of benefit received by the incompetent a charge upon the land. It is true, as contended, that the uniform practice in this state has been to test the validity of deeds, given under the circumstances claimed in this case, by a bill to set them aside. No case is found where, under like circumstances, this court has permitted a deed for which a consideration had been paid, and which appeared to be executed with due formality, to be set aside in an action of ejectment. It has

always been done in equity, where the interests of all parties could be protected. The cases of *Winter v. Truax*, 87 Mich. 330, 24 Am. St. Rep. 160, and *McKay v. Williams*, 67 Mich. 547, 11 Am. St. Rep. 597, relate to deeds which were prima facie fraudulent, being in direct violation of the statute. As stated by this court in *McKay v. Williams*, 67 Mich. 547; 11 Am. St. Rep. 597: "The transaction bears upon its face its own condemnation; it is prima facie void." In the present case the deed is prima facie valid. It conveys a perfect legal title, and its effect can be avoided, if at all, only upon equitable grounds.

¹² Counsel for plaintiff cites a large number of cases from other states in which deeds of incompetents have been set aside in actions of ejectment. But as said by this court in *Harrett v. Kinney*, 44 Mich. 457: "The common-law rule, which excludes all defenses in ejectment which are not legal, has been abrogated in many parts of the Union. The courts of the United States, however, still adhere to it: *Fenn v. Holme*, 21 How. 481; *Hooper v. Scheimer*, 23 How. 235; *Smith v. McCann*, 24 How. 398; *Johnston v. Jones*, 1 Black, 209; *Foster v. Mora*, 98 U. S. 425." It was further said in that case: "And it also remains in force in this state," and that "a defendant in ejectment cannot interpose to the action at law the merely equitable defense that the plaintiff's title was fraudulently obtained." It appeared that the deed was collusively given in execution of a land contract, possession of which was surreptitiously obtained in the absence of the party holding it. It was held that this deed "is not absolutely void in law as for fraud, as it passes the legal title to the grantee named; and the contract purchaser cannot cause it to inure to himself, except by showing his equitable right and title as against the grantee, and this showing cannot be made in an action of ejectment."

In *Michigan Land etc. Co. v. Thoney*, 89 Mich. 231, it was said that: "Nothing is better settled in this state than that in an action of ejectment an equitable title cannot be set up as a defense against a legal title."

In *Paldi v. Paldi*, 95 Mich. 410, it was said: "It is claimed that Justin L. Paldi obtained the deed from the mother of defendant by fraudulent representations. This defense could not be made in an action of ejectment. Upon the execution and delivery of the deed from Angelo Paldi and his wife to Justin L. Paldi, the legal title passed to Justin L. Paldi, and the plaintiff

claims under a deed from Justin L. This traces the legal title to the plaintiff."

¹³ In the present case the deed passed the legal title to Hendrie. It cannot therefore be attacked in ejectment. If the plaintiff has the right to set the deed aside by reason of his incompetency at the time of its execution, he must proceed in a court where the rights of the parties can be fully adjudicated. This cannot be done except in equity.

The judgment of the court below must be affirmed.

The other justices concurred.

INSANE PERSON—DEED OF—AVOIDANCE OF.—The deed of an insane person, not under guardianship, and whose incapacity has not been judicially determined, is not void, but voidable merely: *Castro v. Geil*, 110 Cal. 292; 52 Am. St. Rep. 84, and note; note to *Williams v. Hays*, 42 Am. St. Rep. 753. Where land is conveyed by an insane person before an inquisition and finding of lunacy, for a fair consideration without knowledge of the insanity on the part of the purchaser, the conveyance cannot be avoided if the consideration has not been returned, and no offer to return it has been made: Note to *Dewey v. Allgire*, 40 Am. St. Rep. 474.

DETROIT, GRAND HAVEN, AND MILWAUKEE RAILWAY COMPANY v. GRAND RAPIDS.

[106 MICHIGAN, 13.]

ASSESSMENT FOR STREET IMPROVEMENTS.—RAILWAY PROPERTY necessary for the exercise of its franchise cannot be sold for a street improvement.

AN ASSESSMENT FOR STREET IMPROVEMENTS AGAINST THE TRACK AND RIGHT OF WAY OF A RAILWAY corporation cannot be sustained.

L. C. Stanley, for the complainant.

William Wisner Taylor, for the defendant.

¹⁴ **GRANT, J.** The defendant city opened North Lafayette street across the complainant's right of way. The railroad bed, which is 100 feet wide, crosses the street at an angle of less than 45 degrees. An assessment district was established by the common council, on which was assessed the cost of the improvement, under a charter requiring assessments according to benefits received. The defendant included in this district the complainant's right of way to the distance of 100 feet on each side of the street. It divided this into three parcels, fixing the values at \$1,000, \$480, and \$600, respectively. More than one-twentieth

of the entire cost was assessed to complainant. The assessment on the \$1,000 piece was \$569; on the \$480 piece, \$373; and on the \$600 piece, \$63. It thus appears that on one piece nearly 80 per cent of its entire value was assessed as benefits, and on another piece more than 50 per cent.

1. The first question is settled by the case of *Lake Shore etc. Ry. Co. v. Grand Rapids*, 102 Mich. 374, which holds that railroad property cannot be sold for these assessments.

2. The right of way so assessed contains the main track and one sidetrack. It has nothing else upon it, and is used for no other purpose. It has already been dedicated to a public use, and the question is presented whether a railroad right of way can be assessed by municipal corporations for public improvements. So far from being any benefit, it is established by the evidence that the opening and paving of the street were a damage to the complainant. A right of way cannot be benefited by the opening and paving of a street across it. None ¹⁵ of the buildings of the complainant are within two blocks of this crossing. We can see no benefits, immediate or prospective, to the complainant. The division of the right of way into three parcels was arbitrary, as were also the valuations and supposed benefits. The point is so clearly and concisely stated by the supreme court of Pennsylvania that we quote the opinion in *Philadelphia v. Philadelphia etc. R. R. Co.*, 33 Pa. St. 43: "The municipal authorities paved the Gray's Ferry road for a considerable distance, at a place where it lies side by side with the defendant's railroad, and now seek to charge them with half of the cost of it; but they cannot do it. Their claim has no foundation either in the letter of the law or in its spirit, nor in the form of the remedy. Not in the letter, because the defendants do not own the land sought to be charged, and have only their right of way over it. Not in the spirit, because the paving laws are means of compulsory contribution among the common sharers in a common benefit, and as a railroad cannot, from its very nature, derive any benefit from the paving, while all the rest of the neighborhood may, we cannot presume that the compulsion was intended to be applied to them. Not in the form of the remedy, because the execution for this sort of claim is *levari facias*, a writ not commonly allowed against corporations, and which would hardly produce much when directed against a public right of way. It would be strange legislation that would authorize the soil of one

public road to be taxed, in order to raise funds to make or improve a neighboring one."

The same doctrine is held in *Junction R. R. Co. v. Philadelphia*, 88 Pa. St. 424; *State v. Elizabeth*, 37 N. J. L. 331; *New York etc. R. R. Co. v. Morrisania*, 7 Hun, 652; *Bloomington v. Chicago etc. R. R. Co.*, 134 Ill. 451; *Bridgeport v. New York etc. R. R. Co.*, 36 Conn. 255; 4 Am. Rep. 63; *South Park Commrs. v. Chicago etc. R. R. Co.*, 107 Ill. 105; *New York etc. R. R. Co. v. New Haven*, 42 Conn. 279; 19 Am. Rep. 534.

Decree is reversed, and decree entered in this court ¹⁶ for complainant in accordance with the prayer, with the costs of both courts.

Long and Montgomery, JJ., concurred with Grant, J.

JUDGE HOOPER dissented. He apparently concurred in the view that the premises against which the assessment for street improvements was made could not be sold to satisfy the charge attempted to be imposed thereby, but he nevertheless urged that the local authorities, having jurisdiction to determine what property was subject to the assessment, had authority to determine whether the property assessed had been benefited by the public improvement, and that their decision of this question was final, whether erroneous or not. How the assessment could be enforced, if, as he assumed, the property subject thereto could not be sold, he did not consider.

MUNICIPAL CORPORATIONS—STREET ASSESSMENTS—RAILWAY PROPERTY.—The rights, franchises, and interests of a street railway company chartered by the legislature, and occupying a city street by contract with the city, are liable to assessment for benefits, by the widening of the street in which the track lies: *Chicago City Ry. Co. v. Chicago*, 90 Ill. 573; 32 Am. Rep. 54. But see *Bridgeport v. New York etc. R. R. Co.*, 36 Conn. 255; 4 Am. Rep. 63; *New York etc. R. R. Co. v. New Haven*, 42 Conn. 279; 19 Am. Rep. 534. Also, see extended note to *Western etc. Co. v. Street R. R. Co.*, 25 Am. St. Rep. 475-482.

ST. JOHNS MANUFACTURING COMPANY v. MUNGER.

[106 MICHIGAN, 90.]

PRINCIPAL AND AGENT—EFFECT OF ASSUMING UNAUTHORIZED CONTRACT.—A principal must assume the obligations, if he wishes the benefits, of an unauthorized contract made by an agent.

CORPORATIONS. STOCK SUBSCRIPTIONS, RELEASE FROM FOR MISREPRESENTATIONS.—Though, at a meeting of persons to consider the advisability of forming a corporation, statements are made respecting the business to be incorporated, and its profits, and the mode in which the property to be acquired by the corporation is to be valued, and the changes which are to occur in

the mode of managing the business, a person who subscribes for stock induced by such statements cannot obtain release from his subscription by proving that some of them were false when made, and those respecting the future conduct of the corporation cannot be carried out. The persons thus attending the meeting and making statements cannot be regarded as doing so in the capacity of agents of the subsequently formed corporation, nor can it be deemed to have ratified their acts or statements because it receives the subscriptions induced thereby.

Fedewa & Walbridge for the appellant.

Spaulding, Norton & Weimer, for the appellee.

“**HOOKER, J.** The plaintiff recovered a judgment against the defendant upon an assessment on the capital stock of the corporation, to which the defendant was a subscriber. Upon the trial the plaintiff's counsel objected to evidence in support of the notice accompanying the plea, which objection was sustained, and the case turns upon the sufficiency of the facts stated in the notice as a defense. These facts are substantially as follows: Prior to January 1, 1892, R. M. Steel, of St. Johns, and others, had been carrying on a manufacturing business in that city, under the name of the St. Johns Manufacturing Company. Some time before the date mentioned, a proposition ⁹¹ had been made by Steel to a number of the citizens of St. Johns to incorporate said business with a capital of three hundred thousand dollars, of which two hundred thousand dollars was to be preferred stock, and one hundred thousand dollars common stock; and some time in 1891 the defendant subscribed for fifty shares of common stock by signing an agreement of which the following is a copy, viz: “Whereas, the St. Johns Manufacturing Company is to be incorporated as a stock company, with a capital stock of three hundred thousand dollars, we do each of us severally subscribe and agree to pay for the number of shares of said stock set opposite our respective names the par value of said shares to be ten dollars each. The stock hereby subscribed to be paid in twenty equal monthly installments, commencing October 20, 1891, with seven per cent interest on unpaid portions after January 1, 1892, or all or any part in excess thereof may be paid at any time at the option of the subscriber.”

Prior to said subscription, the defendant had no knowledge of the extent or profits of said business carried on by Steel and others. Prior to the time that the defendant subscribed as aforesaid, a meeting was held at St. Johns, which was attended by Steel and a great number of citizens of the place, for the purpose of considering the advisability of forming a corporation to carry

on said business, and a committee was appointed by said meeting for the purpose of soliciting subscriptions for stock in the proposed corporation. Said committee consisted of citizens of St. Johns, who proposed to and did subscribe for part of the stock of said company. Said committee, "in order to induce" defendant to subscribe for stock, represented to him that the said business had for a series of years been a very prosperous and money making one, and that during the period it had manufactured tables it had never paid less than ten per cent a year on capital invested of three hundred thousand dollars, and had paid as high as seventeen or eighteen per cent a year on said amount of capital. Said committee further represented to the defendant that the business was to be capitalized in the sum of three hundred thousand dollars, of which two hundred thousand dollars was ⁹² to be preferred stock, and one hundred thousand dollars common stock; that the former was to be paid an annual dividend of six per cent from the earnings of the company, and the common stock was to be paid the balance of the profits, which would be at least ten to twenty per cent per year. The machinery was to be invoiced and appraised at its cash value by disinterested persons, and turned in as part of the capital, and the common stock was to have "such representation on the board of directors so that they could protect their interests." It was further stated that the practice of the former company of issuing to its workmen and others coupons payable at the St. Johns Mercantile Company (an institution in which said Steel had a large interest) should be discontinued, and that such coupons should thereafter be made payable at all the stores in St. Johns. The notice alleges, further, that the defendant "relied upon" each of such representations, and was thereby induced to subscribe for such stock. The notice states that preferred stock to the amount of one hundred and ninety-nine thousand dollars is owned by Steel; that the new company has continued to issue coupons payable as before, and not at the stores of St. Johns generally; that Steel's stock was paid for by him by turning over to the new company the plant, machinery, stock, and material connected with the business before the incorporation of plaintiff; that such property was not invoiced and appraised by disinterested persons, but was turned in at more than its cash value; and that each representation made by said committee to the defendant, and by which he was induced to subscribe for said stock, was untrue, and that he had no knowledge of its falsity, either at the time he subscribed or at the time of his payment of one hundred dollars upon

said subscription. The notice asserts, further, that the by-laws adopted by said corporation are antagonistic to the rights of the holders of the common stock, and unjustly prefer the holders of the preferred stock, to an extent that renders the common stock worthless, and that such by-laws were adopted by the votes of the holders of the preferred stock, to the ²³ detriment of the holders of the common stock, and against the protest of some of the latter; that the majority of the directors have been selected by the holders of the preferred stock, and the board has ignored the interests of the holders of the common stock. It is further alleged that the plant has been used for many other purposes than those represented to be contemplated, and for some unauthorized purposes. The foregoing comprises the essential allegations of the defendant's notice, and, if it states a sufficient defense, the judgment must be reversed but, if it does not, it was proper to sustain the objection made by the plaintiff's counsel, and the judgment should be affirmed: *Spicer v. Bonker*, 45 Mich. 630.

Counsel for the defendant say that the plaintiff company is bound by the representations of the citizens' committee which procured the defendant's subscription by misstatements, the benefit of which it cannot receive and retain without assuming responsibility for the representations. This is an attempted application of the rule that, by accepting the benefits of a contract made by an agent, the principal is bound by the undertakings and promises of the agent. A number of cases are cited to sustain this contention, which, manifestly, must rest upon the proposition that the citizens' committee was an agent of the company which its efforts created. Among the cases cited are many which support the general rule above stated, viz., that a principal must assume the obligations, if he wishes the benefits, of an unauthorized contract made by an agent. As stated by Paley: "Contracts made for the benefit of another, but without his privity or direction, may be rejected or affirmed at his election. But, by making the election to affirm it, he adopts the agency altogether, as well that which is detrimental as that which is for his benefit. But, in seeking to enforce contracts entered into by agents, the principal is subject to have them impeached by any conduct of his agent which would have had that effect if proceeding from himself. Every species of fraud, misrepresentation, or concealment, therefore, in the agent, affects ²⁴ the principal's right to

recover": Paley on Agency, 324; Hitchcock v. Griffin, 99 Mich. 451; 41 Am. St. Rep. 624.

This doctrine was applied in the case of *Crump v. United States Min. Co.*, 7 Gratt. 352, 56 Am. Dec. 116, but in that case there was no question of the existence of the relation of principal and agent, and contract relations between the parties. Crump was a purchaser of stock from the pre-existing corporation, through its representative, authorized by the corporation to sell the stock.

Most of the cases cited by counsel relate to contracts made with, or services performed by, promoters, previous to the organization of the corporation, upon an understanding with the prospective stockholders or some of them. It is uniformly held that such arrangements may be ratified by the corporation after organization: *Wilson v. Kings County etc. R. R. Co.*, 114 N. Y. 487; *Bommer v. Hinge Mfg. Co.*, 81 N. Y. 468; *Rockford etc. R. R. Co. v. Sage*, 65 Ill. 328; 16 Am. Rep. 587; *Low v. Connecticut etc. R. R. Co.*, 45 N. H. 370; *Stanton v. New York etc. Ry. Co.*, 59 Conn. 272; 21 Am. St. Rep. 110; *Reichwald v. Commercial Hotel Co.*, 106 Ill. 439; *Whitney v. Wyman*, 101 U. S. 392; *Battelle v. Northwestern etc. Pavement Co.*, 37 Minn. 89; *New York etc. R. R. Co. v. Ketchum*, 27 Conn. 170. But in the case of *Rockford etc. R. R. Co. v. Sage*, 65 Ill. 328, 16 Am. Rep. 587, while admitting the doctrine of ratification, the court say that, "in the absence of an express promise, no promise to pay will be implied from the fact that the company, when organized, accepts and receives the benefit of the same"; and "a right of recovery against a corporation for anything done before it has a proper existence does not appear to rest upon any satisfactory legal principle. It is soon enough for such corporate bodies to enter into contracts encumbering their property when they are duly organized according to their charters, and have their chosen and impartial directors to conduct their business." In *Battelle v. Northwestern etc. Pavement Co.*, 37 Minn. 89, the court recognize this doctrine, saying that, "while a corporation is not bound by engagements made on its behalf by its promoters before it is organized, it may after organization adopt them." In *New York etc. R. R. Co. v. Ketchum*, 27 Conn. 170, the supreme court of Connecticut reaches the same conclusion. The same is ⁹⁵ unquestionably held in Indiana: See *Fox v. Allensville etc. Turnpike Co.*, 46 Ind. 36; *Miller v. Wild Cat Gravel Road Co.*, 57 Ind. 244.

In the present case, the defendant united with others to form a corporation, a preliminary subscription being obtained by a citizens' committee, chosen at a public meeting, all of the members of which became subscribers. The subscription was followed by the adoption and signing of articles of association. The corporation thereby became an entity, and those who subscribed the articles became stockholders. The proposition that such stockholder could charge the association with fraud because he was misled by the fraud of interested persons is suggestive of troublesome results. If this can be done, and the stockholder thereby escape payment for his stock, other stockholders, innocent of the fraud, would find their responsibilities proportionately increased, and the burdens of the concern would be shifted upon those members who were unable to show that they became such through the fraud of others. There would be little stability to corporations, and little safety to stockholders, if this doctrine should be sustained. In this case there not only was not a corporation in existence to be a principal, but the facts set up in the notice do not show that there was an agent of a corporation. The promoters were persons who represented the meeting, or possibly themselves, or some prospective stockholder, who, for purposes of his own, desired to see the corporation organized. They cannot be said to be agents of the corporation in any sense. These subscribers contracted with each other to form a corporation, which they did. If one was guilty of fraud upon the others in procuring their subscriptions, a remedy should exist against such person. Doubtless a subscriber who is induced by fraud to agree to join in the organization of a corporation may refuse to do so on discovering fraud; but, by carrying out his agreement and uniting with others, he has assumed new relations with them and the public, after which his remedy ^{is} is restricted to action against the wrongdoers: See 4 Am. & Eng. Ency. of Law, 201, and notes; *Carmody v. Powers*, 60 Mich. 26.

We think the judgment should be affirmed. Ordered accordingly.

The other justices concurred.

AGENCY.—One adopting and receiving the benefits of the representations of another must accept their burdens: *Eastman v. Provident etc. Relief Assn.*, 65 N. H. 176; 23 Am. St. Rep. 29, and note. See extended note to *Atlee v. Bartholomew*, 5 Am. St. Rep. 109-114.

CORPORATIONS—STOCK SUBSCRIPTIONS—FALSE REPRESENTATIONS BY PROMOTERS.—The fact that promoters of a corporation made false representations prior to its organization as to

the purposes thereof is no defense to an action to recover on a subscription of its capital stock: *Shick v. Citizen's etc. Co.*, 15 Ind. App. 329; 57 Am. St. Rep. 230, and note. But see *Virginia Land Co. v. Haupt*, 90 Va. 583; 44 Am. St. Rep. 939, and note.

COREY v. SMALLEY.

[106 MICHIGAN, 257.]

NOTICE.—POSSESSION OF LAND HELD UNDER AN UNRECORDED CONTRACT of purchase is constructive notice to all persons of the rights of such possessor.

REGISTRATION OF DEEDS, TO WHOM GIVES NOTICE.—The only purchasers charged with notice by the registration of an instrument affecting the title to real property are those who purchase after the filing for such registration. This remains true though the prior purchaser has not acquired the legal title nor made full payment of the purchase price.

VENDOR AND PURCHASER—PAYMENTS MADE AFTER THE LEVY OF AN ATTACHMENT.—One who has purchased land and taken possession thereof under a written contract is not charged with notice of writs subsequently levied upon the interest of his vendor, and is therefore protected against such levies in all payments subsequently made under his contract and without actual notice of the attachment or execution against his vendor, and a conveyance to him by his vendor as the result of such payments is not subject to the levy of such writs.

Moore & Moore, for the complainant.

S. W. Stewart, for the defendants.

²⁵⁸ **HOOKER, J.** Berlin, being the owner of the premises in controversy, sold the same upon land contract to Charlton on June 23, 1891, for three thousand five hundred dollars. Charlton took immediate possession, and continued in possession until December 4, 1891, when he rented the premises to Andrich, who took immediate possession. On February 8 or 9, 1892, Charlton assigned his contract to Corey. Andrich continued in possession as tenant of Charlton and Corey until October, 1892. By arrangement with Charlton, he paid some, if not all, of his rent by selling groceries to Berlin, for which Charlton was to have credit. On December 14, 1891, the record title of the premises was in Berlin. Neither the land contract nor assignment was recorded. On February 18, 1892, Berlin deeded the premises to Corey upon the delivery to him of Corey's check, payable to Mrs. Burroughs, Berlin's sister, and an assignment to Corey by her of the duplicate contract held by Berlin, which it is claimed was sold and assigned to her by Berlin in part payment of an existing debt on August 31, 1891. Meantime, and on December 14,

1891, the defendants had caused a levy of execution to be made upon these premises as the property of Berlin, and complainant was ignorant of this until after his payment. He thereupon filed the bill in this cause to enjoin the sale, and appeals from a decree dismissing it. The evidence indicates that the transfer to Mrs. Burroughs was not in good faith, and it is probable that the circuit judge so found. Corey doubtless paid in ignorance ²⁵⁹ that there was a levy, and in ignorance of any attempt at fraudulent concealment by Berlin.

By the contract between Berlin and Charlton, the latter became owner of an equitable interest in the land, and incurred an obligation to Berlin to pay the consideration. Berlin thereby acquired a chose in action against Charlton, and held the legal title to the land as security. Corey purchased the interest of Charlton, and became entitled to all of his rights. He assumed the obligation of Charlton to pay the consideration, and had a right to the deed of the premises upon full performance of the contract. By the assignment of the land contract to Mrs. Burroughs, Berlin parted with his claim against Charlton, and Mrs. Burroughs acquired the right to collect the same as assignee. Although Berlin thereby parted with his entire interest in the land, he held the legal title, but this title he held in trust for Charlton and Mrs. Burroughs, either of whom, by proceedings in chancery, might compel him to dispose of it in furtherance of the trust—e. g., upon payment to Mrs. Burroughs the complainant could compel Berlin to convey to him, while in case of non-payment Mrs. Burroughs might sell the premises upon proceedings to foreclose her lien. It is plain that, after the sale to Burroughs, Berlin had no interest in the premises which he could avail himself of. If the defendants can establish a defense, it must rest upon the following facts, viz: 1. That the transfer to Burroughs was fraudulent as against them, and therefore void; 2. That neither the contract nor any of the assignments were recorded.

Under the early decisions of this state, the filing of a certificate of levy was held not to be notice to a subsequent purchaser: *Columbia Bank v. Jacobs*, 10 Mich. 349; 81 Am. Dec. 792; *Millar v. Babcock*, 25 Mich. 137; *Campau v. Barnard*, 25 Mich. 381; *French v. De Bow*, 38 Mich. 708. But under 2 Howell's Statutes, section 6173, such certificate, when recorded, became constructive notice to subsequent purchasers in good faith and for a valuable consideration whose conveyance ²⁶⁰ was recorded prior to

the sale: *Atwood v. Bearss*, 45 Mich. 469; *DraKe v. McLean*, 47 Mich. 102. Under these decisions, the record of an execution sale to a bona fide purchaser for value gives the purchaser priority of right over a person claiming under a prior unrecorded conveyance. Again, Act No. 227 of the Public Acts of 1889 provides that the filing of a proper notice of levy with the register of deeds shall be a lien, etc., and that such lien "shall, from the filing of such notice, be valid against all prior grantees and mortgagees of whose claims the party interested shall not have actual nor constructive notice." This statute would be sufficient support for the defendants' claim, were it not for the fact that the complainant's assignor, Charlton, was in actual possession of the premises, either personally or by tenant, at the time of the levy. The premises consisted of a store, and the possession was plain, and was sufficient to have put the defendants upon inquiry. One who purchases land occupied by another than the grantor is chargeable with notice of the rights of the occupant. Possession of land by a contract purchaser is constructive notice of his rights: *Woodward v. Clark*, 15 Mich. 104; *Russell v. Sweezey*, 22 Mich. 235; *Farwell v. Johnston*, 34 Mich. 342; *Dunks v. Fuller*, 33 Mich. 242; *McKee v. Wilcox*, 11 Mich. 358; 83 Am. Dec. 743; *Allen v. Cadwell*, 55 Mich. 8; *Hommel v. Devinney*, 39 Mich. 523; *Seager v. Cooley*, 44 Mich. 14; *Weisberger v. Wisner*, 55 Mich. 246; *Michie v. Ellair*, 54 Mich. 518; *Stevens v. Castel*, 63 Mich. 111; *Moore v. Kenockee Tp.*, 75 Mich. 332; *Schweiss v. Woodruff*, 73 Mich. 473; *Lambert v. Weber*, 83 Mich. 395.

From these cases it is plain that the statute cited by counsel (Pub. Acts 1889, Act No. 227) will not justify the claim that the levy constituted a lien as against the rights of Corey. So far as any payments that were made previous to the levy are concerned, the levy is ineffective. Can the same be said of the later payment? This would seem to depend upon the questions: 1. Whether Berlin had any interest subject to levy; 2. If he had, whether ²⁶¹ the record of the levy was notice to Corey that such interest had been subjected to legal process. If it can be said from the proof that the assignment to Mrs. Burroughs was not fraudulent, and that it was a valid transaction, it follows that between her and Corey the entire interest in the premises was held, and therefore that there was nothing left in Berlin to sell. If, however, such assignment was a shift to prevent a levy, Berlin had an interest, by way of security at least, to the amount of the sum due, which, while not recoverable by him, was sub-

ject to his debts, and under our statutes and practice it might be levied upon, and a bill could then be filed to settle the question of fraud: 2 Howell's Stats., sec. 6108; Doak v. Runyan, 33 Mich. 75. And there is, perhaps, little, if any, doubt that under the statute cited the complainant might have been made a party to a bill in aid of execution, and prevented from paying Mrs. Burroughs. It is not so clear that a mere notice of the claim of fraud would be sufficient to make such payment one at the peril of complainant. Certainly, it would not be a defense against an action by Mrs. Burroughs upon the contract, and complainant would be in no situation to attack the consideration or bona fides of her title.

But it is admitted that he had no actual notice of such claim, for he did not even know of the levy. The defendants' claim, then, seems to rest upon the fact that the levy was recorded, and the further claim that the fact of the levy should have apprised the complainant that the transfer to Burroughs was claimed to be fraudulent, or at least that it had priority over the unrecorded contract and assignment to her. It is a well-settled rule that under the recording acts the operation of the record as notice is prospective, and not retrospective. In Wade on Notice, section 203, it is said: "The only purchasers who are charged with notice by the registration of an instrument affecting the title to land are those who purchased subsequent to the deposit of the instrument with the registering officer."

²⁰³ Numerous cases are cited in support of the text: See, also, 20 Am. & Eng. Ency. of Law, 596, and notes.

This doctrine has ample support in Michigan: James v. Brown, 11 Mich. 25; Ladue v. Detroit etc. R. R. Co., 13 Mich. 380; 87 Am. Dec. 759; Cooper v. Bigly, 13 Mich. 476; Dewey v. Ingersoll, 42 Mich. 17; Atwood v. Bearss, 45 Mich. 469; Shelden v. Warner, 45 Mich. 638; 1 Jones on Mortgages, sec. 562, and note. In Baldwin v. Thompson, 15 Iowa, 504, it was held that, while judgments were liens upon the vendor's interest in land, they were not in themselves notice to the vendee, who might safely pay the consideration in the absence of actual notice: See, also, Polk Co. v. Sypher, 17 Iowa, 358; 85 Am. Dec. 568. The complainant had no such notice, and, having paid in good faith to those apparently entitled to receive the money, should be protected in such payment; and as it appears that at the time Berlin made the deed he (the complainant) had a right to demand it, having paid the full purchase price of the land, there is no reason

for permitting the defendants to proceed with the sale under the levy.

A decree will be entered in accordance with the prayer of the bill, with costs of both courts.

The other justices concurred.

NOTICE—POSSESSION OF LAND—UNRECORDED CONVEYANCE.—The actual, open, and visible possession of real property is constructive notice to a purchaser thereof of whatever rights the possessor has therein. This remains true though he acquired title by a deed not recorded, was in possession of the property before the deed was made, and had an interest therein independent of it, entitling him to be in possession thereof: *Carr v. Brennan*, 166 Ill. 108; 57 Am. St. Rep. 119, and note. See, also, *Doran v. Dazey*, 5 N. Dak. 167; 57 Am. St. Rep. 550.

NOTICE—RECORD AS.—One who takes a mortgage upon real property has constructive notice of every fact which could have been ascertained by an inspection of the deeds and mortgages on record in the chain of title: *Kirsch v. Tozier*, 143 N. Y. 390; 42 Am. St. Rep. 729, and note. See, also, *Pillow v. Southwestern etc. Imp. Co.*, 92 Va. 144; 53 Am. St. Rep. 804.

ATTACHMENT LIEN.—Lien of judgment or attachment does not extend beyond the interest of the debtor in the land. It does not displace prior equities or rights: *Shirk v. Thomas*, 121 Ind. 147; 16 Am. St. Rep. 381, and note.

SCOTT v. CRUMP.

[106 MICHIGAN, 283.]

PUBLIC OFFICERS.—THE PAYMENT OF THE SALARY OF A PUBLIC OFFICER to one who has been declared to be legally elected to an office releases the municipality paying it from all further obligation to pay such salary, though as a result of quo warranto proceedings another is found to be entitled to the office. This rule remains applicable though the officers of the municipality knew of the pendency of the quo warranto proceeding, and had granted to the possessor of the office the certificate of election under which he held such possession, and which was set aside by the judgment in quo warranto.

PUBLIC OFFICERS.—A PAYMENT OF SALARY TO AN OFFICER AFTER A JUDGMENT has been rendered in quo warranto to ousting him from the office is unauthorized, and constitutes no defense to an action against the municipality for the same salary brought by the person found to be entitled to the office.

Hatch & Cooley, T. A. E. & J. C. Weadock, and James E. Duffy, for the relator.

G. H. Francis and T. F. Shepard, for the respondents.

289 *McGRATH, C. J.* At the charter election in West Bay City held April 3, 1893, James A. Scott, relator, was a candidate for comptroller. The returns of the election inspectors gave

him fourteen votes over Charles Glaser, the opposing candidate. Mr. Glaser filed a petition for a recount, which was had, and Glaser was declared elected, and was inducted into the office in April, 1893, and performed the duties of that office until January 11, 1895. Quo warranto proceedings were instituted July 11, 1893, which ultimated in a judgment of ouster, in favor of Scott, January 8, 1895. The city paid the salary to Glaser while he occupied the office, and this is a proceeding to compel payment to relator of the salary for the period during which he was excluded from the office.

It was held in *Board of Auditors v. Benoit*, 20 Mich. 176, 4 Am. Rep. 382, after very full consideration, that payment of a fixed salary to a de facto officer while he is holding the office and discharging its duties is a complete answer to an action brought after a judgment of ouster. Counsel for relator, however, insist that the city was notified of relator's claim of right to the office and of the proposed contest, and that any payments to the incumbent would be at the city's peril; that the council must be presumed to have known that the rejected ballots were legal ballots, and that Glaser was not in office under color of title; that in the present case the authority by virtue of which Glaser was inducted into office proceeded from the council; and that the council was a party to the usurpation.

²⁹⁰ Counsel are in error in assuming that Glaser could not have compelled payment of the salary pending the quo warranto proceeding, and that the council was in a situation to withhold payment. The *Benoit* case was expressly put upon the ground that the title to the office could not be tried in a proceeding to compel the payment of the salary. That question could only be tried in the quo warranto proceeding, and until its determination there was no answer to Glaser's claim for the salary. Glaser was not an intruder or usurper, in the sense that the payment of his salary could have been refused. He held the certificate of election granted by the board of canvassers. It matters not that the members of the common council were ex officio members of the canvassing board. They did not act as a common council in the canvass, but as a board of election canvassers. The common council, acting as such, had no authority in the premises, and could not have afterward determined the question involved. Glaser could not have settled the question by consenting to withdraw in favor of relator. That issue could be determined in but one forum, and in a proceeding to which the people of the state

were made parties. Fraud is not charged, nor can an inference of fraud or improper conduct be predicated, upon the action of the board of canvassers. The determination which they made was reviewed by this court, and, after a hearing and a rehearing, it was finally held that relator was elected by a majority of one: *Attorney General v. Glaser*, 102 Mich. 405. Conceding that the council, in undertaking the defense to the quo warranto proceeding, acted improperly, the municipality is not thereby estopped. Their action did not enter into that controversy, nor did they interpose any obstacle to the determination of the question at issue. In *Stadler v. Detroit*, 13 Mich. 346, Mahaney's appointment was without authority of law. It had been made by the council. Stadler had not been removed or ousted. The council had the power of removal, and it had not exercised it ²⁹¹ in either case. Mahaney's right to the salary depended upon the validity of that appointment.

It is insisted, however, that the salary was paid to Glaser without the proper action of the council thereupon, under the charter of the city; but it has nevertheless been paid, and Glaser was entitled to its payment at the time made. The salary paid to an officer, to which he was entitled when paid, could not be recovered back simply because certain provisions of the charter had not been observed in making the payment.

It appears, however, that the last payment to Glaser was made after the judgment of ouster had been rendered. Such payment was unwarranted: *Comstock v. Grand Rapids*, 40 Mich. 397; *McVeany v. Mayor etc.*, 80 N. Y. 185; 36 Am. Rep. 600; *Dolan v. Mayor etc.*, 68 N. Y. 274; 23 Am. Rep. 168.

The judgment will be affirmed with respect to the amount of the last payment so made, and a mandamus will issue directing the payment over to relator of such amount. In other respects the determination of the court below is reversed. No costs will be awarded.

The other justices concurred.

PUBLIC OFFICERS.—SALARY is an incident of office, and belongs to the person holding the legal title to the office, and he can sue for and recover it when he is a state officer occupying apartments assigned to him and discharging the duties of the office, although another person, claiming to be in possession of the office and to exercise its functions, has received from the proper officers of the state payment of the salary due to the officer de jure: *State v. Carr*, 129 Ind. 44; 28 Am. St. Rep. 163, and note. See, also, *Ward v. Marshall*, 96 Cal. 155; 31 Am. St. Rep. 198.

FULLER v. SWENSBURG.

[106 MICHIGAN, 305.]

COTENANTS—ADVERSE POSSESSION BY ONE OF SEVERAL—PRESCRIPTIVE TITLE.—If a cotenant has occupied the common property exclusively, improving it, and taking the whole rents and profits without claim or objection by the others, though they lived in the same neighborhood, his possession must be deemed adverse, and, if continued sufficiently long, creates in his favor a title by prescription to the real property.

COTENANCY—OUSTER.—AN ENTRY UNDER A QUIT-CLAIM DEED purporting to convey the whole premises, though the grantor owned but a moiety, followed by the exclusive possession of the property, may constitute an ouster of the cotenants of the grantor, and result in a prescriptive title in favor of the possessor.

COTENANCY, NOTICE OF ADVERSE POSSESSION, WHAT SUFFICIENT.—If a person enters into the possession of real property under a conveyance purporting to be of the entirety, cotenants of the grantor must regard such possession as adverse to them from the time they have actual notice thereof, or from the time when, as prudent men reasonably attentive to their own business, they ought to have known that the cotenant in possession was asserting an exclusive right to the land.

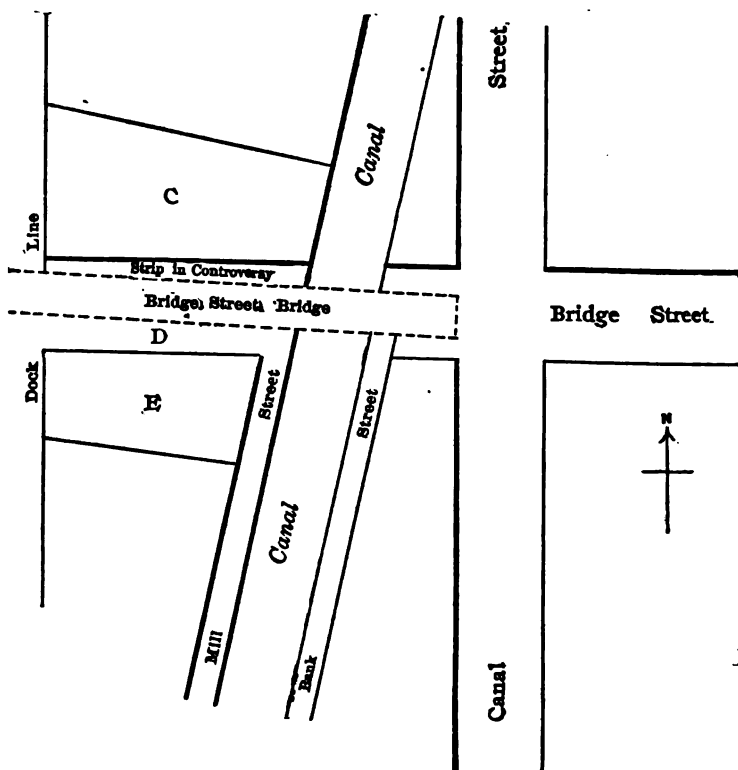
ADVERSE POSSESSION—COTENANCY.—If possession of part of a tract of land is taken under a deed of the whole, the grantee has constructive possession of the whole. This rule is applicable in favor of a cotenant who has entered under a conveyance purporting to be in severalty.

Sweet, Perkins & Judkins, for the complainants.

Myron H. Walker and Taggart, Wolcott & Ganson, for the defendants.

³⁰⁹ McGRATH, C. J. This is a bill, filed in 1891, for partition of two portions of mill lot D in the city of Grand Rapids. The following sketch of a part of the Kent plat will aid in an understanding of the situation.

³¹⁰ The westerly terminus of Bridge street, as dedicated, was Canal street. The "Bridge street bridge," so called, was constructed in 1852 by a private corporation. Its approach was upon lot D, under a lease from the owners of that lot. The grant was of a parcel sixty-six feet in width, but the bridge itself was from thirty-three to thirty-eight feet in width. The city afterward acquired all interest in the bridge. In 1872 or 1873, an abutment was erected at a point on a line with the west wall of the flouring mill hereinafter referred to. Since the city acquired title, the bridge has ³¹¹ been widened. The land in controversy consists of a strip about sixteen feet wide at the canal and nine feet wide at the dock line. It is conceded that complainants and



defendants are owners as tenants in common of that portion of lot D lying south of the bridge, but defendants claim title to the strip lying north of the bridge by adverse possession since 1863.

In 1863, Daniel Ball and Charles H. Carroll were owners in common of said lot D. Ball was the owner of lot C, and in February, 1863, he conveyed by puitclaim deed to one Latimer "all of those portions of lots C and D, Kent plat, lying north of and adjoining the so-called 'Bridge street bridge,' and south of the so-called 'old salt well lot,' . . . excepting and reserving all riparian rights in Grand river, or in the bed thereof, lying west of and adjacent to said premises." In February, 1864, Ball conveyed by warranty deed to one Nichols "all of his right, title, and interest" in lot D, warranting and defending the same, "except the right to draw water and the water rights and riparian rights in and to the bed of Grand river." Latimer, in 1863 and 1864,

by separate deeds, conveyed to each of the following named persons, George H. White, John B. Moon, A. W. Pelton, and John Mangold, "an undivided one-fourth of all of lot D lying north of Bridge street bridge," and other lands. The deed to White was a warranty; the other three deeds excepted lot D from the warranty. Each of these deeds contained the following: "It is intended by this deed to convey one-fourth of all of the lots, pieces, and parcels of land described in and conveyed by a deed," and then follows an enumeration of five deeds, one of which is the deed from Ball to Latimer. White, in 1866, conveyed by quitclaim deed to Moon, and Pelton, in 1864, conveyed by warranty deed to Mangold. Mangold and Moon, in 1867, by warranty deed, conveyed the undivided one-third to Cary and Collins. In 1868, Mangold, by warranty deed, conveyed an undivided one-third to Cary and Collins. In 1871, Cary and Collins conveyed ⁵¹² by warranty deed an undivided one-sixth to Barnes. Moon died testate in 1869. Under his will, Mary Moon took an undivided one-sixth, Lillie E. Mangold an undivided one-twelfth, and Georgiana Moon an undivided one-twelfth. Collins, in 1872, conveyed to Cary by warranty deed an undivided one-fourth. Cary, in 1875, conveyed by warranty deed an undivided one-sixth to Barnes. So that in 1875 Mary (Moon) Shriver owned an undivided one-sixth, Lillie E. (Mangold) Manley an undivided one-twelfth, Georgiana Moon an undivided one-twelfth, Jacob Barnes an undivided one-third, and A. X. Cary an undivided one-third. In 1884, Shriver, Manley, and Moon conveyed by warranty deed their undivided one-third to defendants, and Barnes and Cary in the same year, by circuit court commissioner's deed, conveyed their undivided two-thirds to the Grand Rapids Savings Bank, which bank conveyed by warranty deed to defendants. Isaac Nichols, in 1867, quitclaimed the undivided one-fourth of lot D to Naysmith. Naysmith, in 1873, quitclaimed the undivided one-half of lot D south of Bridge street to Sarah Nichols, and in 1888 the title to this undivided half of that portion of lot D lying south of Bridge street reached defendants. Complainants trace their title to the undivided one-half of the entire lot from Carroll. Their immediate grantor was Cornelia G. Fuller, who acquired her title in 1869, at which time she was a resident of Grand Rapids, and has since continued to reside in that city. Complainants acquired their title in 1879, at which time they were residents of Grand Rapids, and have since continued to reside there.

It is clear from this record that in 1862 and 1863 a flouring mill, to be operated by water power, was built upon lot C, and the same has been operated continuously since that time; that the southeast corner of the mill was less than fifteen feet north of the north line of lot D; that the chute into which the grain was delivered to the mill was located on the southerly side of the mill; that the office was located in the southwest corner of the mill; that as ³¹³ early as 1873 a brick office two stories above ground, having a south frontage of twenty feet, and connecting with the mill, was built at the southwest corner of the mill; that the front of this office encroached upon the sixty-six feet devoted to bridge purposes; that the abutments of the present bridge were constructed in 1872 or 1873, and the footings thereto extended north of the north line of the sixty-six feet aforesaid; that when the bridge was widened, and when these abutments were constructed, the consent of defendants' grantors was first obtained; that when the mill was built the space between the mill and the roadway was partially filled in by defendants' grantors, and when the office was built further filling was done, and for a number of years prior to the commencement of these proceedings the whole space had been filled in to a level with the bridge floor; that when the mill was built a plankway was constructed from the bridge at a point directly south of the office to the mill, and along the south side of the mill; that said planking extended south so as to cover all of the strip in controversy; that the entire portion of lot D in question has been since 1863 used in connection with the operation of said mill, and as an approach thereto; that in said space lumber has been piled, wagons have been stored, and teams hitched from time to time during the entire period; that defendants and their grantors have from time to time excluded other persons from said premises; that since 1863 the taxes upon "all of lot C lying four feet south of flouring mill and all of lot D lying north of Bridge street" have been assessed to and paid by defendants or their grantors; that during the same period the taxes upon one undivided half of that portion of lot D lying south of the bridge have been assessed to and paid by complainants or their grantors, and the taxes upon the other undivided half have been assessed to and paid by defendants or their grantors; that the insurance upon the office building has been always taken out in the name of defendants or their grantors; that from and including Latimer all of the ³¹⁴ grantees of undivided parts of the land in question were, during their holdings, inter-

ested in operating the flouring mill aforesaid; that defendants and their grantors, since the conveyance from Ball, have entered into possession of said premises, and occupied the same, claiming to own the entire interest in the said land in dispute.

The rules respecting the acquisition of title by adverse possession as against a cotenant have been fully discussed by this court in numerous cases: *Dubois v. Campau*, 28 Mich. 304; *Campau v. Dubois*, 39 Mich. 274; *Sands v. Davis*, 40 Mich. 14; *Campau v. Campau*, 44 Mich. 34; 45 Mich. 368; *Highstone v. Burdette*, 54 Mich. 332; 61 Mich. 56; *Cook v. Clinton*, 64 Mich. 313; 8 Am. St. Rep. 816; *Fenton v. Miller*, 94 Mich. 215; *Pierson v. Conley*, 95 Mich. 619; *Watkins v. Green*, 101 Mich. 493.

In *Dubois v. Campau*, 28 Mich. 304, the record was silent as to any acts or declarations accompanying the entry. The trial court instructed the jury that "If they found that Joseph Campau had occupied the property for more than twenty years, without any claim by the plaintiffs or their ancestors to a share of the rents and profits, and without actual acknowledgment of the rights of the plaintiffs or their ancestors, and with the knowledge of the latter, then they are well warranted in presuming anything in support of defendants' title, and they may presume either an actual ouster of the plaintiffs and their ancestors by Joseph Campau, or a conveyance by them to Joseph Campau. Joseph Campau being in possession, he and his heirs are presumed to have had a good title, and the burden of proof is upon the plaintiffs to show title in themselves."

This instruction was approved, and the judgment affirmed. Mr. Justice Campbell, with whom Mr. Justice Graves concurred, held that upon such facts the inference or presumption of title was one of law, while Mr. Justice Christiancy held it to be one of fact for the jury. Mr. Justice Cooley concurred with Mr. Justice Christiancy, but assented to the affirmance of the judgment upon the ground that under any charge that could have ³¹⁵ been properly given in the case the jury should have returned the verdict which they did, and that any different verdict should have been set aside as unwarranted.

In *Campau v. Dubois*, 39 Mich. 274: "Where one of several heirs had taken exclusive possession of land to which all were entitled as tenants in common, and had improved it without interference from the others, though they lived in the immediate neighborhood, and no possessory action was brought by them, or by their heirs or representatives for more than twenty-five

years after their death, it was held that no possession could properly be found that was not adverse and exclusive within the statutory period of limitation, and that there could be no recovery in the right of the excluded parties."

In *Sands v. Davis*, 40 Mich. 14, Sands entered under a quitclaim deed from Filer, claiming the entire title, and it was held that he owed no duty to the other tenants. In *Highstone v. Burdette*, 54 Mich. 332, 61 Mich. 56, the court would seem to have observed the rule as contended for by Mr. Justice Christianity in *Dubois v. Campan*, 28 Mich. 304.

The present case is here on appeal from a chancery decree. Here there was an entry under a deed which purported to convey the entire estate. The deed is supplemented by testimony clearly tending to show that the entry was under a claim of ownership of the whole property; that defendants' grantors bought, and intended to buy, the entire interest; that this claim of ouster and adverse possession had been consistently maintained from 1863 to the commencement of this suit; that until 1884 neither complainants nor their grantors ever asserted any claim to any interest in the premises, and after that time seven years elapsed before any proceedings were instituted; that prior to 1876—a date beyond the statutory period—not only had Latimer entered, but White, Moon, Pelton, and Mangold entered; Pelton and White retired; Cary and Collins and Barnes acquired interests and entered upon the premises; and all these parties entered under conveyances giving them, with the parties in actual possession, the entire estate. The *quo animo* of the ³¹⁶ original entry and of these subsequent entries does not depend alone upon the conveyances. The fact is not disputed.

Complainants insist that a quitclaim deed cannot operate as an ouster: Citing *Woods v. Banks*, 14 N. H. 111; *Hume v. Long*, 53 Iowa, 299; *Packard v. Johnson*, 57 Cal. 180. In each of these cases, however, the conveyance was simply of all the grantor's right, title, and interest, and it was held that a deed could not be even color of title beyond what it purports to convey, that these deeds were merely releases of the interest of the grantors, and that no ouster of the true owner would arise. An ouster need not necessarily be predicated upon a deed from a cotenant. One cotenant may oust another in the absence of any conveyance except that which creates the cotenancy. The ouster must, in such case, arise from other acts. Defendants must show acts equivalent to a denial of the rights of the cotenants. The deed is evidence

of a claim to the entire premises, of the character of the entry, and of the possession under it. It cannot be said to be any the less notice because not a warranty. Conceding that the receipt of a quitclaim deed puts the grantee upon inquiry, it does not follow that defendants' grantors did make inquiry, or that they did not rely upon the deed as a conveyance of the entire estate, or that they did not intend to claim title to the whole. If the question of good faith should be considered, it is to be determined from all the facts. There is nothing in this record upon which an inference of bad faith may be predicated.

Many of the authorities hold that an entry under a conveyance which purports to convey the entirety is equivalent to an express declaration on the part of the grantee that he enters claiming the whole to himself, and is such a disseisin as sets the statute in motion in favor of the grantee: *Freeman on Cotenancy*, sec. 224; 11 *Am. & Eng. Ency. of Law*, 1114. Other authorities hold that the statute does not begin to run until the cotenant has had notice or knowledge of the ouster: 3 *Sharswood and Budd's Leading Cases on Real Property*, §17 121. But it is not necessary that actual notice be shown or brought home to the cotenant. It is said in *Packard v. Johnson*, 57 *Cal.* 180, that plaintiff was ousted from the point of time when he became aware of such claim, or (at the very least) from the time when, as a prudent man, reasonably attentive to his own interests, he ought to have known that his cotenant asserted an exclusive right to the land. Whichever rule is applied, the full statutory period has run against complainants, for it must be conceded that before the expiration of the fifteen years a prudent man, reasonably attentive to his own interests, ought to have discovered that defendants' grantors had asserted an exclusive right to this parcel of land.

The facts of this case bring it clearly within the rule contended for by Mr. Justice Christiancy in *Dubois v. Campau*, 28 *Mich.* 304. The original entry is shown to have been adverse. The intent with which the entry was made is shown as a matter of fact. The delay or acquiescence has been for thirteen years more than that required by the statute of limitations. The cases of *Cummings v. Wyman*, 10 *Mass.* 464, and *Rickard v. Rickard*, 13 *Pick.* 251, are cited in that case by Mr. Justice Campbell. Both were partition cases. Mr. Justice Christiancy, in commenting upon them, says: "The court considered the case [*Cummings v. Wyman*, 10 *Mass.* 464] upon the evidence returned, and

confirmed the finding. . . . The evidence was direct and positive of facts which of themselves constituted an actual ouster long prior to the statute period, and shows affirmatively that the possession was adverse, and there was no evidence of an opposite tendency. And the remark of the court that if the case had been submitted to a jury, and they had found the other way, the verdict would have been set aside (though unnecessary, and by way of illustration), was well founded. But, an actual ouster and adverse possession being affirmatively shown by direct evidence, without any evidence to the contrary, there was no room for and no need of any presumption; and all that is said upon that point is a mere dictum. The court, however, ³¹⁸ expressly treats the presumption as one of fact, not of law, so that the case, as well as the dictum, is directly opposed to the doctrine for which it is cited here. *Rickard v. Rickard*, 13 Pick. 251, also expressly holds the presumption to be one of fact, to be found by the jury from the evidence. But it is remarked: 'It is well settled that a long, exclusive, and uninterrupted possession by one, without any possession or claim of profits by the other, is evidence from which a jury may and ought to infer an actual ouster.' The case was a petition for a partition, where the court, like a jury, considered it upon the weight of the evidence, and found, as any sensible jury must have found from so long a period of exclusive possession under a claim of the whole title (which was there shown), that the possession was adverse. And if a jury in such a case, and upon such evidence, had found otherwise, I should have held without hesitation that the verdict ought to be set aside as against evidence."

It is urged that a conveyance by a tenant in common of a specific part of the common property to a stranger can have no legal effect, or operate to the prejudice of a cotenant. That rule has no application to the situation here. The conveyance here did not attempt to carve out a specific parcel from a larger parcel. The bill alleges that lot D had been divided into two separate and distinct parcels, one lying north and the other south of Bridge street.

There was some testimony tending to show that this strip of land was used by persons other than defendants, to gain access to mills located north of the mill operated by defendants. But the question is an open one, upon this record, as to whether, according to the original dedication, Mill street did not extend to the south line of lot C, and whether a right of way has not been

acquired by prescription along the line of Mill street extended; but a determination of those questions is unnecessary. It is clear that any use of this strip west of Mill street, at least, by persons other than defendants and the persons having business with them, has been a permissive use, and in recognition of defendants' claim of ownership. ²¹⁹ There can be no question concerning defendants' possession. The office built by defendants' grantors in 1873 encroached upon the sixty-six feet granted to the bridge company. It was held in *Campau v. Campau*, 44 Mich. 34, 45 Mich. 368, that the possession of an occupant is coextensive with his claim and color of title. If in possession of a part under color of title to the whole tract, his constructive possession extends to the whole. There is no question but that the possession of the office was notorious and exclusive.

The decree is affirmed, with costs to defendants.

The other justices concurred.

COTENANCY—OUSTER BY ADVERSE POSSESSION.—A conveyance by one cotenant purporting to include the entire land and estate, followed by possession and claim of title, taken, continued, and asserted as adverse for the period of limitation, with intent to oust the other cotenants, constitutes an ouster as to them, and bars their right to recover: *Price v. Hall*, 140 Ind. 814; 49 Am. St. Rep. 196, and note; *Pillow v. Southwestern etc. Imp. Co.*, 92 Va. 144; 68 Am. St. Rep. 804; note to *Alexander v. Gibbon*, 54 Am. St. Rep. 763.

ADVERSE POSSESSION—NOTICE OF—WHAT IS SUFFICIENT.—Undisturbed adverse possession of land under color of title raises a presumption of notice thereof, and constitutes a complete bar to an attack upon the title of the party in possession after the period prescribed by the statute of limitations has elapsed: *King v. Carmichael*, 126 Ind. 20; 43 Am. St. Rep. 303, and note. See, also, monographic note to *De Fries v. Quint*, 28 Am. St. Rep. 158-162.

MICHIGAN TRUST COMPANY v. CHAPIN.

[106 MICHIGAN, 284.]

HUSBAND AND WIFE, HIS AGREEMENT TO PAY FOR HER SERVICES.—An agreement by a husband to pay his wife a designated sum for her services as housekeeper is contrary to public policy and void.

A HOMESTEAD INTEREST CANNOT BE ACQUIRED in real property constituting part of the assets of a partnership as against the creditors thereof.

PARTNER'S INTEREST IN REAL PROPERTY—RIGHT OF CREDITOR TO FOLLOW.—A creditor of a partnership has the right to attach the interest of one of the partners in its real property in the hands of a fraudulent vendee thereof.

Suit by the assignee of Clarence W. and Merrick W. Chapin against Clarence W. and Alice B. Chapin, and Jacob Neff to subject land to the purposes of an assignment. The bill was dismissed as to the defendant Neff, and a decree entered against the other defendants, who appealed.

Thomas F. McGarry, for the complainant.

F. A. Miller and William O. Webster, and Clute & Clute, for the defendant.

385 McGRATH, C. J. Oscar Webber and Clarence W. Chapin had been for many years engaged as partners in banking. They had acquired as such the real estate in question. On the twenty-eighth day of December, 1892, they entered into an agreement whereby Webber was to withdraw from the firm, was to receive six thousand dollars, and the new firm of C. W. Chapin & Co., composed of defendant C. W. Chapin and his brother, Merrick W. Chapin, agreed to pay all outstanding indebtedness. On the seventeenth day of July, 1893, Webber and wife quitclaimed to Alice B. Chapin the lots in controversy. On August 23, 1893, Jacob Neff, a creditor of Webber & Chapin, sued out an attachment, and levied upon the lots so conveyed to Alice B. Chapin, who is the wife of defendant C. W. Chapin. On July 25, 1893, Clarence W. Chapin and Merrick W. Chapin made an assignment to one Gorham, who filed this bill to set aside the deed to Alice B. Chapin as having been made without consideration and in fraud of creditors. Complainant prosecutes as receiver, afterward appointed.

It is unnecessary to discuss the testimony as to the main question, as we are fully satisfied that at the time of the dissolution of the firm of Webber & Chapin the concern was insolvent, and

that the agreement was part of a general scheme to relieve Webber, continue the business, and substitute C. W. Chapin & Co. as debtors. Before the assignment, a number of the creditors of Webber & Chapin had surrendered the evidences of indebtedness which were held by them at the time of the dissolution, and accepted C. W. Chapin & Co. The theory ²⁹⁶ of the Chapins is, that at the time of the dissolution it was agreed that Webber should convey his interest in the lots in question to whomever Chapin should direct, and that before the deed was executed he sent to Webber a draft of the deed running to Alice B. Chapin which Webber and wife executed and returned. It is insisted on behalf of Alice B. Chapin: 1. That she gave a valid consideration to her husband for the property; and 2. That it was the homestead of herself and husband. Alice B. Chapin's claim is, that at the time of the conveyance her husband was indebted to her, and that the indebtedness grew out of an agreement on his part, when they began housekeeping, to pay her two hundred and fifty dollars per year for her services as housekeeper. Such an agreement, if ever made, is contrary to public policy. The promise to pay for services which the very existence of the relation made it her duty to perform was without consideration: Schouler on Domestic Relations, sec. 43; Grant v. Green, 41 Iowa, 88. Respecting the homestead claim, C. W. Chapin and family had lived in a house upon the premises for a number of years, but it was nevertheless partnership property, and a homestead interest could not be acquired therein. "The assets of a partnership," as is said in Hubbardston Lumber Co. v. Covert, 35 Mich. 254, "are held in a sort of community; but the partners do not hold as common tenants or joint tenants. The property is distinctly separated from that belonging to the individual members, and it constitutes an identical and entire interest. . . . As partner there is no power to bind individual interests": Moran v. Palmer, 13 Mich. 367; Hutchinson v. Dubois, 45 Mich. 143; Way v. Stebbins, 47 Mich. 296; Bishop v. Hubbard, 23 Cal. 514; 83 Am. Dec. 132; Robertshaw v. Hanway, 52 Miss. 713; Burnside v. Merrick, 4 Met. 537; Uhler v. Semple, 20 N. J. Eq. 288.

As to the Neff attachment lien upon the property, Neff is a creditor of Webber & Chapin. He had an undoubted right to follow Webber's interest in the property into the hands of a fraudulent vendee of that property.

387 The decree of the court below is affirmed, with costs to defendant Jacob Neff.

Long, Grant, and Montgomery, JJ., concurred.

Hooker, J., did not sit.

HOMESTEAD—IN WHAT MAY BE ACQUIRED—PARTNERSHIP LANDS.—One partner cannot, either as against the creditors of the firm, or as against his copartners, acquire a homestead right in real estate belonging to the firm: Extended note to *McCoy v. Brennan*, 1 Am. St. Rep. 594.

PARTNERSHIP.—The right of the creditors of a partnership to pursue its real property is discussed in the monographic note to *Smith v. Smith*, 43 Am. St. Rep. 377-380.

Agreements between Husband and Wife to Compensate Each Other's Services, or Relinquish Claims on the Other's Earnings or Profits.

Agreements or other transactions between a husband and wife having for their object the payment by the one to the other for services rendered, or the vesting in one the profits or accumulations of a business conducted by him or her, may be questioned: 1. By one of the parties thereto or his legal representatives on the ground that the agreement was without consideration and against public policy, or was entered into by parties not competent to contract with each other; 2. By third persons other than creditors seeking to attack the agreement or transaction, and to resist its enforcement as against them; or 3. By creditors of either the husband or the wife who claim that the agreement, whether express or implied, ought or ought not to be carried out, so far as their interests may be affected thereby.

By the common law, a wife was not competent to contract, except to a limited extent in reference to her separate property. Hence, any postnuptial agreement made between her and her husband might, at least as against her, be disregarded on the ground that she was not competent to enter into it: *Mackinley v. McGregor*, 3 Whart. 369; 31 Am. Dec. 522; *Beach v. Beach*, 2 Hill, 260; 38 Am. Dec. 584; *Helms v. Franciscus*, 2 Bland, 544; 20 Am. Dec. 402. The right of a married woman to contract is generally conceded by the statutes now in force in the various states of this Union, some of which also give her power to make contracts with her husband. We shall not here enter into any special consideration of the statutory law on the subject, but, assuming that the husband and wife were competent to contract with each other by the statutes of the state wherein the question arises, shall inquire to what extent the contract may be sustained or assailed on other grounds. In the first place, both parties to a marriage assume certain obligations and become entitled to the performance of certain duties, and neither has any right to exact any further consideration for the performance of any marital duty whatsoever. Hence, an agreement between a husband and wife promising each other and their children that all past subjects of dispute shall be ignored, that she shall keep her home and her children in a reasonably good condition, and that he will provide for the necessary expenses of the family, and, in addition

thereto, pay her for her personal use two hundred dollars per year, cannot be enforced against him, because without consideration, for the reason that the promises on the part of the wife are "to do just what is demanded by the marital relation and is essential to domestic felicity," and for the additional reason that the inquiries necessary to be made in a court to determine whether such a contract had been performed by the wife "would strike at the very foundation of domestic life and happiness. Public policy dictates that the doctrine of such inquiries should be closed and that the parties shall not contract in such a manner as to make such inquiries essential to their enforcement": *Miller v. Miller*, 78 Iowa, 177; 16 Am. St. Rep. 431.

Probably if the husband has been guilty of some violation of his marital obligations entitling his wife to a divorce, and proceedings therefor are pending, the dismissal of these proceedings and the condonation of his offense may constitute a sufficient consideration for an agreement to pay her for returning to, and resuming, her marital relations with him: *Phillips v. Meyers*, 82 Ill. 67; 30 Am. Rep. 295; *Adams v. Adams*, 91 N. Y. 381; 43 Am. Rep. 675. The mere separation of the spouses and the wife's agreement to discontinue such separation cannot constitute a sufficient consideration for an agreement upon the part of the husband to pay her for so doing, for in returning to, and living with, him she but performs the duties contemplated by their marriage: *Copeland v. Boaz*, 9 Bart. 233; 40 Am. Rep. 89. Certainly, the wife's duty to her husband does not terminate or diminish because of his infirmity or illness. If he should become insane, and a guardian should be appointed for him, who, as such, enters into a contract with the wife to assume the care and custody of the husband, and to be paid a specified sum therefor, this contract is void, because the services to be rendered by the wife clearly fall within her wifely and marital duties: *Grant v. Green*, 41 Iowa, 88. Though a statute should be enacted purporting to give a married woman her earnings, or the "wages of her personal labor," it obviously refers to wages or earnings when she is employed by others, or carrying on some business on her own behalf, and does not render her husband any the less "entitled to her labor and assistance in the discharge of those duties and obligations which arise out of the married relation. We feel very clear that the legislature did not intend by this section of the statute to release and discharge the wife from her common law and scriptural obligation and duty to be a 'helpmeet' to her husband": *Mewhirter v. Hatten*, 42 Iowa, 288; 20 Am. Rep. 618.

Upon the husband rests the duty of providing for his wife and family and of meeting their obligations, and at the common law, he was also answerable for her antenuptial debts: *Conner v. Berry*, 46 Ill. 370; 95 Am. Dec. 417; *Cole v. Seeley*, 25 Vt. 229; 60 Am. Dec. 258, and note 259-264. Possibly, as in the nature of compensation of these liabilities, he was entitled to the services of his wife and family, and such services and their proceeds were as much his as any other class of property. In the division of labor between the husband and wife her services were ordinarily in the keeping of the house, in the

caring for children, and in the preparation of food and clothing, and for the performance of these duties she certainly could not exact any payment from him, and any agreement on his part to compensate her for them is without consideration, and, consequently, nonenforceable, nor, in our judgment, will the courts ordinarily undertake in actions by wives against husbands to determine whether services performed by a wife fall without the limits of her wifely duties, so that she may contract with her husband to be paid therefor: *Whitaker v. Whitaker*, 52 N. Y. 368; 11 Am. Rep. 711; *Blaeckinska v. Howard Mission*, 130 N. Y. 497. This question has, however, usually arisen in controversies between the wife and her husband's creditors, and we shall reserve the further consideration of it until we reach that topic.

Third persons other than creditors of either the husband or the wife may seek to avoid an agreement between the husband and the wife respecting her services and respecting property which has accrued to her as the result thereof, as where the wife, with the assent of her husband, either express or implied, has performed services for another for which he has agreed to compensate her, or has obtained property as the result of her services, and she sues for the possession thereof, and the defendant in the action claims that she cannot maintain it, for the reason that the cause of action belongs to the husband only. Conceding a husband to be entitled to the services and earnings of his wife of every nature, there is no doubt that he may, unless his creditors are prejudiced thereby, make gifts to her: *Peck v. Brumagin*, 31 Cal. 440; 89 Am. Dec. 195; *Gill v. Woods*, 81 Ill. 64; 25 Am. Rep. 264; *Garner v. Garner*, Bush. Eq. 1; 57 Am. Dec. 583; *Fox v. Jones*, 1 W. Va. 205; 91 Am. Dec. 333; and that such gifts may, when perfect, be enforced against third persons. Hence, if a wife, with the consent of her husband, agrees to perform services for another, whether of a domestic nature or not, or whether rendered at her home or not, for which such other agrees to compensate her, as where she cares for a person in his illness, or boards him, or washes for him, or renders any other lawful service whatsoever, and he has agreed to pay her therefor, the assent of the husband to such agreement operates as a waiver of his right to its proceeds and as a gift thereof to the wife, and hence such person or his representative, when sued by her, cannot successfully defend on the ground that the cause of action, if it exists at all, is one in favor of her husband: *Wren v. Wren*, 100 Cal. 276; 38 Am. St. Rep. 287; *Mason v. Dunbar*, 43 Mich. 407; 38 Am. Rep. 201; *Jones v. Reed*, 12 W. Va. 350; 29 Am. Rep. 455. Therefore, if a woman contracts with the owner of a tract of land to cultivate it on shares, and subsequently, with the consent of her husband, performs her contract, from which a crop results, the landlord cannot resist her claim therefor on the ground that the interest in the crop for which she stipulated belongs to her husband: *Meriwether v. Smith*, 44 Ga. 541.

The validity of contracts, express or implied, to the effect that a wife shall be compensated for her services, or shall have the profits of a business conducted by her, may be drawn in question in a controversy with creditors who either claim that their interests require

the contract to be observed, or, on the other hand, that it amounts to a gift from the husband to the wife which cannot be sustained as against them. In the first of these classes of cases are involved business transactions of constantly increasing magnitude for which the law has not, up to the present time, made any very careful provision. We refer to those instances in which mercantile and other transactions are conducted by and in the name of a married woman with the assent, or, at least, without the dissent, of her husband, and she acquires property and incurs obligations in the transaction of such business, and when her creditors seek to enforce such obligations, they are met by the claim that the property acquired does not belong to her, but to her husband, and, therefore, is not subject to any writ against her. We have heretofore considered this question and reached the conclusion that under these circumstances the husband must either be regarded as having made a gift of property and business to his wife, or, at least, as estopped from denying that the property and business were hers where such denial would prejudice the rights of creditors whose claims have accrued to them in dealing with her respecting such property and business upon the assumption that they were hers, and that she was entitled to incur obligations payment of which might be enforced therefrom: *Partridge v. Stocher*, 36 Vt. 108; 84 Am. Dec. 685, and note 678-676; *Diefendorf v. Hopkins*, 95 Cal. 343; *Coughlin v. Ryan*, 43 Mo. 99; 97 Am. Dec. 375.

Generally, however, the attack upon a transaction by which a wife has been paid something for her personal services, or has invested their proceeds in property, or property has been conveyed to her by her husband in consideration of moneys due for such services, comes from his creditors who contend that the transaction is a scheme devised for the purpose of defrauding them, or, if not so devised, that it is, at least, equivalent to a gift which the husband, under the circumstances, could not make without hindering, delaying, or defrauding them. If the services performed by the wife and for which her husband agreed to pay her were in the nature of ordinary marital or household duties, of course, his agreement to pay for them was not binding upon him because without consideration and his compliance with it must be deemed a mere gift to his wife, not sustainable as against his creditors, except under the same conditions as would permit the sustaining of any other voluntary transfer by him, and therefore his creditors have the right to any property received by her from him in carrying out his agreement that they have to any other property given by him to her: *Stirzer v. Kee*, 146 Ill. 577; *Gable v. Columbus etc. Co.*, 140 Ind. 563; *Michigan etc. Co. v. Chapin*, 106 Mich. 384; ante, p. 490; *Apple v. Ganony*, 47 Miss. 189; *Reynolds v. Robinson*, 64 N. Y. 589; *Bucher v. Beam*, 68 Pa. St. 421; *Campbell v. Bowles*, 30 Gratt. 652; *Millott v. Bentley*, 17 Wis. 591. Nor is it material that the services were not rendered directly to the husband if they were in performance of duties resting upon him, as, for instance, in the caring for, and nursing of his mother in illness or old age, he expressly agreeing to pay his wife therefor, and carrying out his agreement by conveying

property to her in good faith in satisfaction of his contract with her: *Coleman v. Burr*, 25 Hun, 239; 93 N. Y. 17; 45 Am. Rep. 160.

If creditors can be said to have any right to the services of their debtor's wife, such right is surely restricted to services of the ordinary character, and if she is permitted to reap the fruits of extraordinary services, though such fruits are paid or turned over to her by her husband, we do not see how the transaction hinders or defrauds his creditors, or can result in prejudice to them. We are aware that there are several cases which maintain the right of a husband to all services actually rendered by his wife, irrespective of their character or any agreement by him with her under which she was induced to render them, and in which relief has therefore been granted to his creditors to the extent of setting aside any conveyances made to her, whether by her husband or others, though the consideration therefor was money earned by her after her marriage in the doing of work which she was under no obligation to perform, as where she assisted her husband in his business: *Brittain v. Crowther*, 54 Fed. Rep. 295; or washed, or cared for persons not members of her family, or took in boarders, under an agreement with her husband, whether express or implied, that she might have for her own use, or as her separate estate, the proceeds of these labors: *Belford v. Crane*, 16 N. J. Eq. 265; 84 Am. Dec. 155; *Cramer v. Redford*, 17 N. J. Eq. 367; 90 Am. Dec. 594; *Blaeckinska v. Howard Mission*, 130 N. Y. 497; *Bailey v. Gardner*, 31 W. Va. 94; 13 Am. St. Rep. 847. This proposition appears to us unreasonable. If, as the result of representations made by a husband to his wife, she is induced to embark in a business on her own account or led to discharge duties obviously not devolving upon her by virtue of her marital relations, under his promise that she shall have the proceeds of such business or the compensation resulting from the discharge of such duties for her own use, nothing is thereby taken away from his creditors, and ought not to be entitled to compel the husband to act in bad faith to the extent of repudiating his agreement with his wife, nor to reclaim from her property which has been conveyed to her in satisfaction of such agreement: *McNaught v. Anderson*, 78 Ga. 499; 6 Am. St. Rep. 278; *Gilbert v. Glenny*, 75 Iowa, 513; *Carse v. Retlicker*, 95 Iowa, 25; ante, p. 421; *Riley v. Mitchell*, 36 Minn. 3; *Peterson v. Mulford*, 86 N. J. L. 481; *Nuding v. Ulrich*, 169 Pa. St. 289; *Yake v. Pugh*, 13 Wash. 78; 52 Am. St. Rep. 17. Of course, we exclude from this statement those cases in which the attendant circumstances are such as to convince the court or jury that the alleged agreement between the husband and wife was a mere device resorted to for the purpose of defrauding his creditors.

As a wife may manage her separate estate and in so doing may have agents and employes and make valid agreements to compensate them for their services, there seems to be no reason why she may not employ her husband as her agent, and enter into a valid agreement with him fixing the amount of his compensation: *Keller v. Mayer*, 55 Ga. 406-406, and if she becomes the debtor of her husband, his creditors may, by process of garnishment, enforce for their

own benefit the liability existing against her and in favor of him: *Keller v. Mayer*, 55 Ga. 406. Whether, in the absence of any express contract upon the subject, there is an implied obligation on the part of a wife to compensate her husband for services in the management of her separate estate is a question which has been but very little considered by the courts, the tendency of the few existing decisions upon the subject being to the effect that under ordinary circumstances there is no such implied contract upon her part: *Lewis v. Johns*, 24 Cal. 98; 85 Am. Dec. 49; *Perkins v. Perkins*, 7 Lans. 19.

It has sometimes happened that a husband has devoted the major part of his time and all of his skill and ability either in the management of the separate property of his wife or in the conduct of business carried on in her name, and that her property has been augmented in value or her business caused to realize large profits, and the husband being indebted and having no other property, his creditors have claimed that they should in some manner be permitted to enforce their obligations against the fruits of the husband's labor and skill though existing in the form of the wife's separate estate or business, and there are, doubtless, cases indicating that this claim of his creditors ought under some circumstances and by some mode of procedure to be sustained: *Wortman v. Price*, 47 Ill. 22; *Patten v. Patten*, 75 Ill. 446; *O'Leary v. Walter*, 10 Abb. Pr., N. S., 439; *Gildeden v. Taylor*, 16 Ohio St. 501; 91 Am. Dec. 98. On the other hand, it is insisted that creditors do not have any right under the existing laws to compel their debtor either to labor for them, or, though he labors for himself or others, to accumulate a fund out of which they may be able to compel the payment of their demand. Where the separate property of a wife consists of a farm upon which she and her husband reside, or by the tilling of which, though they do not reside upon it, he produces the means for their subsistence, we think the majority of the courts would not hold that there was any implied contract that she should reimburse him for his labors, nor that the result or such labors would make the products of the place his property, rather than hers, and therefore subject to execution against him, where such products would not be subject to execution against him had she employed other agents and servants in their production: *Cooper v. Ham*, 49 Ind. 393; *Buckley v. Wells*, 38 N. Y. 517; *Abbey v. Deyo*, 44 N. Y. 343; *Trapnell v. Condyn*, 37 W. Va. 242; 38 Am. St. Rep. 30; *Dayton v. Walsh*, 47 Wis. 113; 32 Am. Rep. 757. In a comparatively recent case upon the subject it appeared that a husband failed in business, being at the time indebted to his wife; that she with other creditors obtained a judgment against him under which his stock of goods was sold under execution to her and other of his creditors, who thereafter continued the business, employing him as a clerk; that ultimately she purchased the interest of the other creditors, and thereafter prosecuted the business in her own name, employing her husband to act as a manager at a salary of five dollars per week, they and their family being supported out of the proceeds of the business. After this course of dealing had continued for several years, she sold the business and invested the

proceeds in real property, which the husband's creditors sought to reach and appropriate to the payment of their debts. The court held that the evidence in the case did not sustain the claim that any scheme had been entered into or pursued with the view of defrauding the husband's creditors; that as against such creditors the wife might lawfully employ her husband, with or without hire, to manage and assist in carrying on the business; that in availing herself of the services of her husband she did not subject her separate estate to the claims of creditors; and finally "that the time, talents, and industry of a debtor are at his own disposal, and that his creditors have no claim thereto; that he may bestow them gratuitously upon whom he will, upon his wife as well as another; that he cannot be compelled to labor for the benefit or advantage of his creditors": *Mayers v. Kaiser*, 85 Wis. 382; 39 Am. St. Rep. 849; *Barter v. Maxwell*, 115 Pa. St. 469. In a still more recent decision the court conceded the right of a wife to the assistance and labor of her husband which might be given to separate property, and "although it may be changed from a rude to a manufactured state, it remains her property still, and cannot be levied on by execution or attached for his debts." The court, however, reached the conclusion that there were circumstances under which a court of equity would undertake to grant relief as against a wife to the extent of wresting from her part of the profits of a business realized through the skill and labor of her husband. After examining many authorities, the court said: "From these and other numerous authorities examined there can be no other conclusion reached than that if a man skilled in any employment does business in his wife's name with the capital furnished by her, and large profits over and above the necessary expenses of the business, including the support of himself, wife, and family, accrue therefrom, owing to his skill and experience, and he turns such profits over to his wife or invests them in property for her, a court of equity will treat such arrangement as fraudulent, and will make an equitable distribution of such profits between the wife and existing creditors of the husband. Not that the wife is guilty of any actual fraud, but that her hand, be it ever so chaste, is polluted by receiving as a gift from her husband the funds which he is endeavoring to fraudulently conceal under the cloak of her separate property, from the searching eyes of his creditors": *Bogges v. Richards*, 39 W. Va. 567; 45 Am. St. Rep. 938. It is well to remember, in connection with this language, that it was applied to a case in which a man owning property conveyed it, in contemplation of his approaching marriage, to his intended wife for the purpose of defrauding his creditors, of which purpose, however, she had no notice; and that in every subsequent act and scheme the husband was, in the opinion of the court, actuated by a desire to avoid his creditors and to so manage his business that the very considerable profits accruing therefrom and from his labors should not result in any fund or property subject to the satisfaction of their demands; and that he appeared to take special delight in showing how skillfully he had managed to increase the value of his wife's estate mag-

nificantly, and yet secure it beyond the reach of the clutches of his own creditors." This, doubtless, incited the court to extreme language and measures for the purpose of thwarting an unconscionable scheme and formulating rules to discourage future attempts of a like nefarious character. The language of wrath, even when justifiable, is rarely applicable to ordinary affairs, and this is especially true when it takes the form of general rules. This applies to the utterances of judges and others discharging functions of a public nature, as well as to the less cautious denunciations of persons speaking for private interests only.

CHEEVER v. NORTH.

[106 MICHIGAN, 320.]

A WILL IS NOT REVOKED BY THE SUBSEQUENT EXECUTION of another will containing no express clause of revocation, and the destruction of the latter will, therefore, revive the former and leave it in full force. This rule is not destroyed nor modified by a statute declaring that no will shall be revoked unless by burning, tearing, or obliterating the same with intent to revoke it, or by some other will in writing executed by the testator as prescribed by such statute. Such subsequent will, to have the force attributed to it by this statute, must remain unrevoked at the death of the testator.

A WILL TAKES EFFECT as such only on the death of the testator.

WILLS, REVOCATION OF.—THE BURDEN is upon one who asserts that a later will contained a clause revoking a former one.

WILL—CODICIL—EVIDENCE TO PROVE.—Testimony to the effect that the witness, being in a room with the testator, he showed her a writing, read parts of it, and asked her to make a memorandum of its purport, and told her the names of the executors of his will, and that the papers so exhibited were signed and witnessed, tends to prove that this paper, if testamentary in character, was a codicil to the will in which the persons so spoken of as executors are named as such.

WILLS, COSTS OF CONTEST OF.—Under a statute permitting the court in contests of wills to award costs to either party, in its discretion, to be paid by either or out of the estate, as justice and equity shall require, no more than actual taxable costs can be allowed.

Noah W. Cheever, John F. Lawrence, and A. J. Sawyer, for the proponents.

Thompson & Harriman and Thomas A. Bogle, for the contestants.

322 MONTGOMERY, J. This is an appeal from the judgment of the circuit court probating the will of Merchant H. Goodrich, who died February 19, 1892. The will probated bore date May 12, 1888. It was in testimony, and not disputed, that deceased, in December, 1888, or January, 1889, executed another

will, to which Dr. John Greenshields and R. L. Parkin were witnesses. There was also testimony tending to show that the will offered for probate was found among the papers of deceased, and that no other will or codicil was found. The jury found, in answer to special questions, that the Greenshields and Parkin will was destroyed by decedent, and that a codicil, of which an abstract was in evidence in the case, was executed as a codicil to the will offered for probate, and that Goodrich also destroyed this codicil. The jury further found that the subsequent will, known as the "Greenshields and Parkin Will," was executed by Goodrich, and that it made a complete disposition of his estate. There was no finding by the jury, nor was there any evidence, upon the subject of whether the subsequent will contained a revocation of the prior will, in terms.

1. The circuit judge charged the jury, in effect, that a second will, which contained an express revocation of a prior will, would have the effect to revoke it, but that, if the later will contained no clause revoking the former will, the subsequent destruction of the later will by the testator would revive the former will. There is an irreconcilable conflict of authority upon the question of the effect of the destruction of a second or subsequent will upon an earlier one. The great weight of authority is to the effect that the execution of a subsequent will, containing an express clause revoking the former will, operates as a revocation at once, and that the former will ³⁹³ thus revoked cannot be subsequently revived, except by republication, and is not renewed by a destruction of the later will: *James v. Marvin*, 3 Conn. 576; *Pickens v. Davis*, 134 Mass. 252; 45 Am. Rep. 322; *Scott v. Fink*, 45 Mich. 241, and cases cited. But we think the weight of authority, and also the previous expressions of this court in *Scott v. Fink*, 45 Mich. 241, favor the doctrine that, as to a will containing no express clause of revocation, it does not have the effect, of its own force, to revoke the former will, and that the destruction of such later will effects a revival of the earlier will. The cases which maintain this doctrine rest upon the ground that all wills are, in their nature, ambulatory until the testator's death, at which time, and not before, the testament becomes operative: *Flintham v. Bradford*, 10 Pa. St. 82; *Peck's Appeal*, 50 Conn. 562; 47 Am. Rep. 685; *Simmons v. Simmons*, 26 Barb. 77, and cases cited *supra*.

We are cited to the statute (2 Howell's Stats., sec. 5793), which provides: "No will, nor any part thereof, shall be revoked, unless

by burning, tearing, canceling, or obliterating the same, with the intention of revoking it, by the testator or by some person in his presence and by his direction; or by some other will or codicil, in writing, executed as prescribed in this chapter; or by some other writing, signed, attested, and subscribed in the manner provided in this chapter for the execution of a will."

And it is urged, with much show of plausibility, that the execution of a new will operates, under this statute, to revoke the former will. Such, however, is not the strict reading. If, at the common law, a will duly executed is ambulatory, and is held, for the purposes of this question, to take effect only at the death of the testator, we think the statute should be construed as having reference to the common-law rule. The revocation may be by some other will, but it occurs when the will takes effect, not when executed. This statute no more than declares the common law on the subject. The precise ³⁹⁴ question was involved in Peck's Appeal, 50 Conn. 562, 47 Am. Rep. 685. The statute of Connecticut provides: "No will or codicil shall be revoked except by burning, canceling, tearing, or obliterating it by the testator, or by some person in his presence by his direction, or by a later will or codicil": Gen. Stats. 1875, p. 370.

It was said: "Prior to 1821, as well as since, the law was so that a later will, when it took effect by the death of the testator, revoked a prior inconsistent one. That proposition is not questioned. If *James v. Marvin*, 3 Conn. 576, is an authority, before the statute a subsequent will, containing no revocatory clause, did not, during the lifetime of the testator, revoke a prior will. In respect to that point, we do not think the statute was intended to make any change. . . . The testatrix, by executing the second will, evinced no intention to become intestate, but, rather, a contrary intention. By destroying the last will, and carefully preserving the first, she affords satisfactory evidence that she intended, until the very last, to die testate, and that that should be her will. In the absence of an express provision to that effect, we cannot presume that the legislature intended that the mere execution of a will should, in all cases, revoke a prior will. Such a construction would in many cases defeat the manifest intention of the testator. The statute requires a 'later will or codicil.' We think that means an operative will or codicil."

In *Scott v. Fink*, 45 Mich. 241, it was said: "There seems to have been a material distinction, and on good ground, between the state of a former will, after a second one merely inconsistent

with it, and its state after a second one with a declaration expressly revoking it. In the first case the only chance for the second to operate in revocation of the first, according to the prevalent theories of the courts, was by its coming to a head as an active will, which it could do only by surviving its author. Being the last expression of the decedent, and at the same time practically inconsistent with the prior one, the intent to repeal the first by it was to be implied. In case, however, of its being recalled by the testator in his lifetime, it could not, on the theory referred to, be taken to have had the effect to do away with its predecessor. ³⁹⁵ Being cut off before having its disposition of property awakened into life, it could have no affirmative operation, through its dispositions, upon the estate."

And after holding that a will containing a clause of revocation does operate to revoke a former instantaneously, and of its own force, the court concludes by saying: "Upon consideration, the doctrine of *James v. Marvin*, 3 Conn. 576, *Boudinot v. Bradford*, 2 Dall. 266, and others holding the same views, and ruling in accordance with what has just been expressed, appears to be most consonant with our system and with popular understanding, and at the same time the most reasonable and safe."

While it may be said that this language was not absolutely necessary to a determination of the case, yet it is evident that a conclusion was reached and the announcement made after careful deliberation; and we feel that we ought not to disturb the rule laid down, without being convinced of its error upon authority.

2. The burden of proof is upon a party who asserts that the later will contained a clause of revocation: *Thornton on Lost Wills*, sec. 115; *Beach on Wills*, sec. 73; *Caeman v. Van Harke*, 33 Kan. 333. The circuit judge charged the jury: "It is incumbent upon the party who claims that the second revokes the first will to establish, by a fair preponderance of the evidence, that it contained a clause of revocation. I am not aware that there is any direct evidence in this case that any of the later wills contained any express clause of revocation."

Complaint is made of this, and it is discussed in the brief of counsel as though it related to the subject of the burden of proof to establish the destruction of the later will, which it clearly does not. It relates solely to the proof of the contents of the last or destroyed will. It is true that the later will having been proven, this amounted to a revocation of the former will, if in existence at the time of the testator's death. But if the fact is

established ³⁹⁶ that the will was kept in his custody, and could not be found after his death, this raised a presumption that the will was destroyed *animo cancellandi*: 1 Redfield on Wills, 350. There was no request upon the subject of the burden of proof, and we do not think any error was committed by failing to charge upon this subject any more specifically, in the absence of requests.

3. Testimony was introduced showing that the decedent at one time exhibited to Dr. Lum and his wife a paper which was either a will or a codicil, and the jury, in answer to a special question, found this to have been a codicil to the will admitted to probate. It is contended that there was no evidence that this was a codicil to this will, and the court was asked so to charge. Mrs. Lum testified to an occasion when a transcript of a certain paper was made; that she and her husband were in the room of deceased; that he took out a sheet of foolscap paper, read portions of it, and asked her to sit down and copy off the purport of the paper. He told her that Mr. Vance and Mr. Cheever were the executors of the will, and he said, at the last, that, if there were any changes in the will, he would let her know. She was then asked:

"Do you know the difference between a codicil and a will?

A. I did not at that time.

"Q. Do you know now? A. You told me. Yes, sir.

"Q. After having been told the difference between a codicil and a will, I want to know what he said to you on that subject, if you can recollect anything he said about it. A. Simply that he had made this slight alteration in his original will. That was all.

"Q. That was all there was about that? A. That was all."

She further testified that the paper which she saw was signed and witnessed. The only will of which Vance and Cheever are executors is the will offered for probate in this case. As before stated, Mrs. Lum made an abstract ³⁹⁷ of this paper in the presence of decedent, which she retained. It appears that this abstract does not dispose of all the property. We think, under this testimony, that there was some evidence that this was a codicil to the will of 1888.

4. It is claimed that error was committed, when Mrs. Anna North was on the stand, by an offer on the part of proponents' counsel to show that the subsequent will was destroyed by the

witness. When this offer was made, counsel for contestants stated that, if proponents' counsel desired to show that the witness destroyed the later will, he would concede it, for the purposes of the case, and go to the jury. It is difficult to conceive how this offer could have damaged the contestants, inasmuch as the court charged the jury, at their request, as follows: "If you find the will witnessed by Dr. Greenshields and Dr. Parkin was not revoked or destroyed by Merchant H. Goodrich, but has been lost or destroyed by another person, it is still the last will and testament of Mr. Goodrich, and may be probated."

The most that can be said is that it might have had a tendency to create a prejudice against the contestants. But the line of inquiry indulged by counsel was proper for the purpose of showing, if he could, by such cross-examination, a change in the state of the mind of the testator toward Mrs. North, who was one of the beneficiaries in the later will. We do not think error was committed in this regard.

Other questions are presented by the appeal of the contestants, which we have examined, but deem it unnecessary to discuss in this opinion. We think no error was committed to the prejudice of the contestants.

The proponents also appeal from an order of the court awarding two hundred dollars costs to the contestants. There are two sections of the statute bearing upon this subject. Section 6791 reads as follows: "In all cases that shall be contested either in the probate court or in the circuit court, such court may award ^{and} costs to either party, in its discretion, to be paid by the other or to be paid out of the estate which is the subject of the controversy, as justice and equity shall require."

Section 8982 provides that: "Upon appeals from probate courts to a circuit court and from the circuit courts to the supreme court, costs shall be paid by the appellant or respondent, as shall be directed by the court to which the appeal is made; and upon affirming any sentence, determination, or decree, or upon the appeal being discontinued or quashed, the court may, in its discretion, award damages for the delay and vexation caused by such appeal."

We think the costs should have been limited to the actual taxable costs, and the judgment will be so modified. The proponents will recover costs of this court.

The other justices concurred.

WILLS—WHEN COMMENCE TO OPERATE.—A will speaks from the death of the testator, that being the point of time at which it becomes operative, unless the language used, such as the word "now" or a verb in the present tense, requires it to be taken at the time it is used: *Succession of Allen*, 48 Ia. Ann. 1036; 55 Am. St. Rep. 295. See, also, *Johnes v. Beers*, 57 Conn. 295; 14 Am. St. Rep. 101, and note.

WILLS—REVOCATION BY SUBSEQUENT WRITING.—The revocation of one will by another may be express or implied, total or partial. It is express when a later will declares that all pre-existing wills are revoked. There is no doubt that such a declaration is not indispensable to the revocation: *Monographic note to Graham v. Burch*, 28 Am. St. Rep. 352, on the revocation of wills.

WILLS—CONTESTING—COSTS.—When there is probable cause for contesting a will, and the estate is valuable, the costs and a reasonable attorney's fee for the contestant will be taxed against the estate: *Seebrook v. Fedawa*, 33 Neb. 413; 29 Am. St. Rep. 488, and note; *Clapp v. Fullerton*, 84 N. Y. 190; 90 Am. Dec. 681.

PETAJA v. AURORA IRON MINING COMPANY.

[106 MICHIGAN, 463.]

MINING—LIABILITY OF COMPANY TO LABORERS INJURED BY UNSAFE TIMBERING.—If miners are put to work in a mine where it is the practice, as ore is removed, to support the roof by timbers upon notice from the miners themselves or from a shift boss, or foreman, having charge of the work, a laborer cannot recover for injuries received by the failure to timber the place from which ore had been removed, if the miners had not caused the timbermen to be notified that their services were required, though such miners had called the attention of the shift boss to some indications of danger, and he had directed them to resume work. If there was negligence either on the part of this boss or of any miner, it was the negligence of a fellow-servant, for which no recovery can be had.

MINING—SAFE PLACE IN WHICH TO WORK—DUTY TO FURNISH.—It is not the duty of a mining corporation to furnish a safe place in which the miners may work, if the progress of their work necessarily renders the place unsafe until it is properly timbered, and the practice is for them to notify the timbermen when their services are required, and no such notice being given, the place becomes unsafe through want of timbering, and an injury thereby results.

MINING—FELLOW-SERVANTS.—Miners who loosen and bring down ore to the floor of a mine and laborers who load it upon cars are fellow-servants. Hence, the latter cannot recover of the owner of the mine for the negligence of the former.

MASTER AND SERVANT—MINING—SAFE PLACE IN WHICH TO WORK.—Though it is the practice in mining, after ore has been excavated, to support the roof by putting up timbers, the room made thereby cannot be said to be a place furnished to servants in which to carry on their master's business, and which he must, at his peril, keep in a reasonably safe condition. His duty is performed by using reasonable care in furnishing suitable material and employing capable and efficient men to do the work.

Julius J. Patek, Clark & Pearl, and Cahill & Ostrander, for the appellant.

Charles E. Miller, for the appellee.

408 HOOKER, J. Plaintiff, a trammer in defendant's iron mine, was injured by the fall of ore from the roof of the room in which he was at work loading ore into a car. The work was conducted as follows: The miners loosened and brought down the ore to the floor of the stope or room made by taking out the ore, which room was constantly being enlarged by the process. This ore was loaded upon cars and removed by common laborers, called "trammers." As fast as the ore was removed, it was the practice to support the roof by timbers and posts set a few feet apart. These were called "sets," and were put in place by a force or gang of men who were called from place to place, as wanted, upon notice from the miners themselves, or through the shift boss or foreman, who had charge of the work of the mine. Above the shift boss was a captain, who had general supervision of the work in the mine. The posts were placed about eight feet apart, a set being eight feet square. The post, being two feet in diameter, was capped and braced, and covered with lagging to support the roof, which had a tendency to crumble. Sometimes large masses of ore would fall, as in this instance. The drift or vein was twelve sets wide, 467 and the room in question was being mined across the vein, about forty feet of the vein being its length, while it would be about one hundred feet wide across the vein, when completed. The miners had taken out sufficient ore to make room for five sets into the vein, and so much appears to have been properly timbered up. At the time of the accident they had mined a space in advance of the last set, which the plaintiff claims was wider than should have been taken without support. The testimony differs about its width, but there is evidence that it was not sufficiently cleaned out to permit of timbering at the time of the accident, and this does not seem to have been disputed. Some indications of danger were noticed by the trammers, who called the attention of the shift boss to it, but, after looking at it, he told them it was all right, and to "quit monkeying," and resume work, which they did. The accident occurred about thirty minutes later. The court directed a verdict for the defendant.

The claim of the plaintiff is, that the master did not furnish a safe place to work. In our opinion, this place where the men

were at work was an incident of mining. It was a result of the common work of the miner and the trammer, both of whose labor combined to make it. After the miner had loosened the ore, and the trammer had removed it, it was ready for the timbermen, who followed up when notified, putting in sets, which enabled the process of mining to be carried further. The undisputed evidence shows that the trammers and miners had not put the newly opened space in condition for the timbermen, and that the miners had not caused them to be notified that their services were required. If there can be said to have been culpable negligence, it was either in mining too large a space before cutting out the corners preparatory for the sets, or in failing to notify the timbermen if sets could have been put in before the ore was still further removed. In either case, if the fault of the miner, it was the negligence of a fellow-servant under the plainest rules. And the same is ⁴⁰⁸ true if it was through a failure upon the part of the shift boss to cause timbering to be done earlier. He was a foreman, who directed when and where blasts should be put in, and where the men should work, and who was appealed to to settle questions arising as the work progressed. His relation to the men under him was similar to that of a foreman of a section gang upon a railroad to his men, or one in charge of workmen upon a train: *Schroeder v. Flint etc. R. R. Co.*, 103 Mich. 213; 50 Am. St. Rep. 354. Unless it can be said that the duty to furnish a safe place to work is involved, the court was right in directing a verdict for defendant.

There are duties which a master owes to employés, which he must perform; and while he may confide the performance of such to another, the obligation is still the master's, and he cannot avoid it by authorizing another to perform the act. In such cases it is not an answer to say that he has provided a competent agent, although such agent may be a fellow workman, and in many things a fellow-servant, of the injured person. This question has been discussed of late, and authorities cited, in the opinion of Mr. Justice Montgomery in the case of *Schroeder v. Flint etc. R. R. Co.*, 103 Mich. 213; 50 Am. St. Rep. 354. See, also, *Beesley v. Wheeler*, 103 Mich. 196. In the latter case the distinction between temporary places built to assist in construction, as stagings, and permanent places, within which men are expected to perform labor, is pointed out. The only difference between the *Beesley* case and this is that in the former the staging was preliminary to the work of construction, while in this

it was an incident of the work being done; and we see no difference in principle. The same distinction was made in the case of Coal etc. Co. v. Clay, 51 Ohio St. 542. This was a case of injury resulting from a failure to support the roof of a mine, and the court say: "We need not discuss this proposition, for we have not that case. Here the place was not furnished as in any sense a permanent place of work, but was a place in ⁴⁶⁹ which surrounding conditions were constantly changing and, instead of being a place furnished by the master for the employes, within the spirit of the decisions referred to, was a place the furnishing and preparation of which was in itself part of the work which they were employed to perform. The distinction is shown in a number of cases" (which are cited in the opinion): See, also, Butler v. Townsend, 126 N. Y. 110; Benzing v. Steinway, 101 N. Y. 547; Stringham v. Hilton, 111 N. Y. 188.

It follows that the judgment should be affirmed.

The other justices concurred.

A rehearing having been applied for and granted the further opinion of the court was delivered as follows by

HOOKER, J. The substance of the question which we are disposed to consider upon the rehearing of this cause is, whether the fact that mining operations have proceeded beyond a given point in the stope, and the stope has been "timbered" up to that point, changes the portion so timbered so that it is to be treated as a place to work, within the decisions requiring a master to furnish the servant a reasonably safe place to work. The alleged inaccuracy of the court, in stating that the testimony showed that the miners had not put the newly opened space in condition for the timbermen, has no bearing upon this question; and we are satisfied with the proposition enunciated—that the failure of the miners or boss to notify the timbermen that the place was in readiness was the negligence of fellow-servants of the plaintiff.

But it was urged by counsel that in the discussion of the question the court neglected to consider the fact that, at the time of the accident, the last timbers set did not support the roof of the mine, the lagging being some distance below the roof, by reason of the caving or dropping of ore from the roof, above the lagging, until it left a ⁴⁷⁰ space between the lagging and the roof of the mine, and that, as this increased the area of roof unsupported, it caused the ore to fall and injure the plaintiff. It is apparent that if we are to adhere to the holding that miners and trammers

are fellow-servants, and that the shift boss, like the foreman of a section gang, is not an exception, there can be no theory upon which the plaintiff can recover, except that, immediately the room was in readiness for timbers, it was the duty of the master to see that they were properly set and maintained. And it is obvious that this claim must be, as it is, planted upon the rule that, in appropriate cases, requires the master to provide a safe place.

The operation of mining, in this and similar mines, is to sink a shaft, and from the shaft start a drift, from which stopes or rooms are excavated across the vein, from the lower to the upper or hanging wall. It is accomplished by caving down and removing the ore. It is manifest that this cannot proceed unless the roof is supported behind the miners, and this is done by putting up timbers to support the roof until the ore shall be excavated beyond. It is said that, when the room has been excavated sufficiently large, it is the practice to cave the room down into the mining sets, and place more timbers on top of the first. Now, if this room can properly be said to be a place furnished to the servants in which to carry on the master's business, and which he must, at his peril, keep in reasonably safe condition, as a factory or warehouse, then the case should have gone to the jury; but if it is not such a place, then it falls within that other rule, that the duty of the master is performed by using reasonable care in furnishing suitable material and employing capable and efficient men to do the work.

In view of the cases of *Schroeder v. Flint etc. R. R. Co.*, 103 Mich. 213, 50 Am. St. Rep. 354, and *Beesley v. Wheeler*, 103 Mich. 196, cited in the former opinion, there is no doubt that a master must furnish a reasonably safe place for a servant ⁴⁷¹ to work, if a structure is required for the carrying on of his business; and the briefs furnished in this case upon the part of the plaintiff would render us more assistance, had they called our attention to cases establishing the claim that a master is obliged to make safe the place which the servant makes and occupies as a means of doing his work, or which results as an incident of the work, although it necessitates his presence in a place, to a greater or less degree, unsafe. In such cases, must the master stay with, or follow up, the servants, to be certain that they make the place safe, so that they or some of them be not injured?

There are many cases which draw the distinction pointed out. Such a case is *Beesley v. Wheeler*, 103 Mich. 196. Several other

cases are cited in the former opinion. In *Fraser v. Red River Lumber Co.*, 45 Minn. 237, it is said: "An important consideration, often overlooked, is whether the structure, appliance, or instrumentality is one which has been furnished for the work in which the servants are to be engaged, or whether the furnishing and preparation of it is itself part of the work which they are employed to perform."

As we understand from the brief of counsel and the record—and we do not discover a denial of it—this stope or room starts from a drift at or near what is called the "foot wall" which is the bottom as distinguished from the overlying stratum of the vein of ore. Both foot wall and top wall depart from the level, and dip sharply, so that, in running the stope on a level, it can go but a short distance until the top or overhanging wall is reached; and then the operation is repeated above the lagging, removing the lagging and caving down the roof, supporting the new roof thus formed by new sets placed upon the first. Thus, so far as the lagging is concerned, it has a temporary use merely to enable the miners to push the breast through to the overhanging wall, by supporting the roof. It is a part of the operation of mining, ⁴⁷² as much as a blast or a staging, and is not a part of the permanent structure.

The following cases confirm us in our opinion that, as an incident or means of excavating the ore, the master has only the duty of furnishing competent men, and furnishing suitable materials for the use of those engaged in the common employment: *Hall v. Johnson*, 3 Hurl. & C. 589, where it was held that "an underlooker in a mine, whose duty it was to examine the roof, and prop it up if dangerous, was a fellow laborer with a workman": *Waddell v. Simoson*, 112 Pa. St. 567, where it was decided that "the operator of a coal mine fulfills the measure of his duty to his employes if he commits his work to careful and skillful bosses and superintendents." And in *Consolidated Coal Co. v. Scheller*, 42 Ill. App. 619, the court held that, if a master exercises reasonable or ordinary care in selecting men and materials, a mine owner is not liable if the roof falls. In *Quincy Min. Co. v. Kitts*, 42 Mich. 34, a workman was injured by a fall occasioned by the breaking of a bridge across a permanent opening, consisting of a winze or perpendicular shaft for ventilation in a mine. The timberman was held to be a fellow-servant, which excludes the theory contended for in this case. A case substantially like

the one before us is *Coal etc. Co. v. Clay*, 51 Ohio St. 542 (cited in the former opinion).

We see no occasion to change or modify the opinion heretofore filed in this cause, which disposed of all questions necessary to a decision of the case.

Judgment affirmed.

The other justices, Long, C. J., Grant, Montgomery, and Moore, JJ., concurred.

MASTER AND SERVANT—WHO ARE FELLOW-SERVANTS.—

Fellow-servants are those who are so far working together as to be practically co-operating, and who have an opportunity to control or influence the conduct of, and who have no superiority over one another: *Flannegan v. Chesapeake etc. Ry. Co.*, 40 W. Va. 430; 52 Am. St. Rep. 806, and note; *Norfolk etc. R. R. Co. v. Hoover*, 79 Md. 253; 47 Am. St. Rep. 392. See, also, note to *Richmond etc. Ry. Co. v. Norment*, 10 Am. St. Rep. 835.

MASTER AND SERVANT—SAFE PLACE TO WORK—DUTY TO FURNISH.—It is a master's duty to exercise reasonable care to procure for his servant a reasonably safe place in which to work, reasonably safe appliances and instrumentalities for his work, and competent persons as his collaborators: *McElligott v. Randolph*, 61 Conn. 157; 29 Am. St. Rep. 181, and note. See, also, *Elledge v. National City etc. Ry. Co.*, 100 Cal. 282; 38 Am. St. Rep. 230, and note; *Libby v. Scherman*, 148 Ill. 540; 37 Am. St. Rep. 191, and note. One who is operating a coal mine by the aid of cars and other machinery while he is not an insurer of the safety of his employes, is yet bound to do all that human care, vigilance, and foresight can reasonably do, consistent with the practical operation of the mine, to put and keep it and the instrumentalities there used in a safe and good condition: *Southwest Imp. Co. v. Smith*, 85 Va. 306; 17 Am. St. Rep. 54, and note.

McMORRAN v. FITZGERALD.

[106 MICHIGAN, 619.]

NUISANCE—MACHINE AND BLACKSMITH SHOP IN A RESIDENCE DISTRICT.—If one purchases ground in a suburban district occupied by costly residences, and proceeds to erect a shop and to carry on a business which causes smoke laden with cinders, soot, and disagreeable odors to penetrate such houses, rendering them unclean, uncomfortable, and, to a material extent, unwholesome, and to a material degree destroying the comfortable, peaceable, and quiet occupation of such houses, he may be enjoined from continuing the disagreeable use of his shops and property.

Atkinson & Wolcott, for the complainants.

Chadwick & McIlwain, for the defendants.

¶1 **HOOKEE, J.** The defendants are the owners of a machine and blacksmith shop, devoted to boat repairing, situate

upon the St. Clair river, at Port Huron, in a neighborhood otherwise devoted to residences. The buildings in the immediate vicinity are among the finest and most costly in the city, and are correspondingly furnished. The circuit judge found that the locality was especially adapted to the purpose of residences of this character, and had been exclusively so used for many years prior to the erection of the defendants' shop, and that this fact was plainly apparent to the casual observer at the time the shop was built. He further found that this shop, and boats which it called to the locality for repairs, emitted from their several smokestacks, smoke laden with cinders, soot, and disagreeable odors, which penetrated the houses, rendering them unclean, uncomfortable, and to a material extent unwholesome, and that it had to a material degree destroyed the comfortable, peaceful, and quiet occupation of the complainants' homesteads, which, if continued, would be irreparable; and he rendered a decree granting the prayer of the bill, to the extent of enjoining the use of the defendants' premises for the purposes to which they are now devoted. This was upon the proposition that relief by injunction should be granted where the business complained of ⁶⁵² produces what is offensive to the senses, and renders the enjoyment of life and property uncomfortable.

Injunctions restraining the use of property in accordance with the owner's interests should be cautiously granted. As a rule, the owner may make such use of his premises as his business or taste may dictate, and the only limitation upon his right is that he must so use his property as not to cause injury to the property or rights of those owning property in the vicinity. There should not be a technical or fanciful interpretation of this rule. It must always be applied in the light of the circumstances; and uses of property which might be improper in one locality may be proper in another. Thus a slaughterhouse might be protected in a place remote from residences or places of business, though the land of an adjoining proprietor should not be free from noxious odors arising therefrom. But in a populous district, or in case that the adjoining proprietor should choose to erect a residence upon his premises, the slaughterhouse would be or might become a nuisance. Smoke and noise which are common in cities would be intolerable in rural or suburban districts, and, as such, might be excluded by the law. As long as the smoke and tumult are confined to portions of a city which are

principally devoted to such business, little difficulty arises, and, though theoretically a resident of such locality may have the same rights to immunity from discomfort, usually his personal interest in the increase of values which results from occupation for business purposes satisfies him. But when one invades a suburban district with an offensive and noisy business, which from its nature is injurious to those having homes in the vicinity, merely because he can purchase land cheap, or because the location has peculiar advantages for his purpose, he takes the risk of being compelled to compensate the injured neighbors, or perhaps desist from the offensive use of the property.

An inspection of the evidence satisfies us that, from the standpoint of most anyone who would be likely to ^{and} occupy the residences of these complainants, the conduct of the defendants' business would be annoying and offensive in the extreme. There is ample evidence of tangible injury to the property by smoke and soot, and of unpleasant odors and noises, which would make life uncomfortable. The extent of this varies with the wind and the season of the year, but it is nevertheless a substantial invasion of complainants' rights. There is little in the case to excuse it, beyond the proposition, which, so far as practicable, should be maintained, that one should be permitted to do as he will with his own property. As stated before, the situation was apparent before the defendants purchased the premises for the purpose of erecting their shop, and before its erection they were cautioned, and were offered a large sum to abandon the project; but they insisted. Further earnest of complainants' sincerity was given by the commencement of a suit to restrain the operation of this plant. But the defendants persisted, and could look at the matter only from the standpoint of business, to which all other interests should yield—a sentiment which is not uncommon, but one which the law does not sanction. Our opinions of the evidence accord with those of the circuit judge, and the authorities fully sustain his legal conclusion that, within reasonable limits, a man is entitled to freedom from smoke, soot, noise, and noxious odors in his home, taking into consideration the character of the locality and pre-existing conditions. Authorities are numerous in support of this doctrine. A discussion of the subject will be found in Wood on Nuisances, chapter 15, where authorities are cited. See, also, in addition to cases cited in the briefs of counsel, Gaunt v. Fynney, 8 Ch. App. 8; Ball v.

Ray, 8 Ch. App. 467, and note to this case found in 6 Eng. Rep. 440.

We think that the decree of the circuit court should be affirmed.

McGrath, C. J., and Montgomery, J., concurred. Long and Grant, JJ., did not sit.

NUISANCE—LAWFUL TRADE OR BUSINESS—INJUNCTION. The carrying on of a lawful business will be restrained when the prosecution of such business renders the enjoyment of a neighboring dwelling-house materially uncomfortable on account of smoke, cinders, or offensive odors: *Euler v. Sullivan*, 75 Md. 616; 32 Am. St. Rep. 420, and note. See *Susquehanna Fertilizer Co. v. Malone*, 73 Md. 268; 25 Am. St. Rep. 595, and note. But the fact that a single person of most sensitive taste is seriously disturbed by a lawful business, is not enough to call for the interference of the court: *Price v. Grants*, 118 Pa. St. 403; 4 Am. St. Rep. 601, and note.

CASES
IN THE
SUPREME COURT
OF
MINNESOTA.

GILFILLAN v. SCHMIDT.

[64 MINNESOTA, 28.]

WATERS — SURFACE — RIGHT TO DRAIN — LIABILITY FOR OVERFLOW.—An upper proprietor, while he cannot divert surface water on his land from its natural course to the unnecessary injury of his adjoining owner, may aid the natural and only possible system of drainage by deepening the natural outlet for such water, if this is absolutely necessary in the interests of good husbandry and the reasonable improvement of his lands, and does not inflict unnecessary injury upon the lower proprietor and, although the effect of such act is to cause more water to flow upon the land of the latter than otherwise would, he is not entitled to an injunction to restrain the act of the upper proprietor, nor to recover damages for a usual or unusual overflow of his lands caused by ordinary or extraordinary rainfall, unless he can show that the deepening of the natural waterway was the efficient and proximate cause thereof. This is especially true when it appears that the benefit derived from the deepening of such outlet is very great as compared with any injury likely to result therefrom, and there is nothing to indicate that the lower owner cannot readily protect himself against such injury.

Action for an injunction restraining the defendants from maintaining a ditch, and to require them to fill it up. Judgment for the plaintiff, and defendants appealed.

Welch & Hayne, for the appellants.

Gilfillan, Willard & Willard, for the respondent.

31 MITCHELL, J. The findings of the trial court are very long, mainly descriptive of the situation, and largely consisting of statements of what may be called "evidentiary facts." For this reason it is somewhat difficult to state wherein they are, and wherein they are not, sustained by the evidence. An examina-

tion of the record, however, shows that there is no real conflict in the evidence. It discloses substantially the following state of facts:

The lands of the two defendants Schmidt constituted a watershed, which naturally drained from the east, north, and west into a large marsh, slough, or pond, indicated on defendants' plat, situated mainly on the lands of the Schmidts, but extending a short distance into the north side of the lands of defendant Clasen. The lands of the defendants in the immediate vicinity of this slough or pond were naturally wet and marshy, by reason of the spongy nature of the soil, their proximity to the pond, and the fact that they were only slightly elevated above the ordinary level of the water in the slough or pond; but they were capable, by drainage, of being rendered dry and valuable grass lands. This slough or pond was not fed by any springs or natural streams, but entirely by surface waters from the adjacent watershed.

In the wet seasons of the year this large marsh or slough filled with surface water from the surrounding watershed, covering from thirty to forty acres, presenting the appearance of a large pond or small lake, from six to eight feet deep in its deepest part, but, in the dry seasons, frequently covering only a few acres, to the depth of from two or three feet in its deepest part down to only a few inches in its shallowest places. The natural outlet for the waters which thus collected in this slough or pond was at its south end, whence, in wet seasons, they flowed in a large stream southerly, through a fairly well-defined course, on substantially the line of the ditch indicated on defendants' plat, into a pond or bog in the north part of plaintiff's land; thence, through a depression or outlet on the west side of this pond or bog, first, westerly, and thence southerly, as indicated on the same plat, into Gleason's lake, which, in turn, flowed into Lake Minnetonka. In brief, the natural drainage of the large marsh or pond on defendants' lands, and of the watershed tributary to it, was substantially as indicated on defendants' map; and throughout its entire course the flow of this water was through a fairly well-defined ³² natural depression in the soil. The slope or fall of the lands was to the south, and about nine feet to the mile.

As already stated, at certain seasons of the year the flow of water was quite large, while at others it would diminish, and, finally, in the dry portions of the year, entirely cease; leaving, however, a considerable quantity of water in the big marsh or pond on defendants' land, the effect of which was to leave the

lands adjacent to this pond either covered or saturated with water so late in the season as to render them practically valueless. The lowest point on the east or southeasterly side of the pond or bog on plaintiff's land was some three feet higher than the outlet on the west side, already described. Hence the water in this pond or bog would have to rise about three feet above the level of this outlet on the west before any of it would overflow to the east or southeast. Such was the condition of things before the defendants committed any of the acts complained of.

About fifteen or sixteen years ago, the defendants, or their grantors, for the purpose of draining their lands, dug a ditch from the south end of the big marsh or pond down to about the third or lowest stone culvert marked on defendants' map. This ditch commenced at the natural outlet of the marsh, and substantially followed the natural waterway. Practically, what defendants did consisted of deepening the outlet and waterway about two feet. While this ditch has been repaired and cleaned out at different times, it still remains of substantially the same depth as when first dug. Subsequently, and for the same general purpose, the defendants extended this ditch through Clasen's land, down to the bog or pond in the north side of plaintiff's land, also following substantially the line of the natural waterway. This part of the natural waterway seems to have been more clearly defined than the part up next to the big marsh or pond, and what defendants did on it consisted mainly in straightening it, and removing local obstructions, but not greatly deepening it. The defendants Schmidt have also extended the ditch up through the big marsh or pond, and likewise dug some short lateral ditches, as indicated on their plat, to aid the natural drainage of their lands into this large or central pond or marsh; but these acts are not important in the determination of this case. Of course, the effect of deepening the outlet and natural waterway south of the big ³³ marsh or pond is to cause more of the water to flow out, and to leave less of it to stand in the marsh, thereby so far relieving defendants' lands of the burden of these waters as to render much of them valuable meadow lands, which would otherwise be valueless. There is no evidence that defendants have done anything more than is necessary in the interests of good husbandry, or than they might lawfully do in the reasonable use of their own lands, provided they are not thereby casting a burden on plaintiff's lands which they have no right to do.

In July, 1892, there was an unusually heavy rainfall, from the effects of which the big marsh or pond on defendants' land rap-

idly filled with water, which flowed in great volumes through the ditch cut by defendants, into the slough or bog on the north of plaintiff's lands, and filled it up to so high a level that large quantities of water flowed out southeasterly, as indicated on plaintiff's map, and spread over his meadows, and either found its outlet into Parker's lake, or else remained on the meadows until absorbed or evaporated, thereby causing serious damage to plaintiff's crop of hay. To secure protection against a recurrence of this injury, plaintiff brought this action for a preventive injunction, forbidding the defendants from maintaining the ditch across their lands.

There is no evidence and no claim that the digging of the ditch—that is, the deepening of the outlet and waterway of the big marsh or pond on defendants' land—imposes any additional burden upon, or does any injury to, plaintiff's land, unless it be by causing the water to overflow to the southeast, over his meadows. Neither is there any evidence that it ever did thus overflow either before or since the ditch was dug, except on this occasion, in July, 1892, after this unusually heavy rain. So far as appears, on all other occasions the water did not flow down any faster or in any greater volume than could find its outlet through its natural course into Gleason's lake. The court finds that originally the natural flow of the water from the slough or bog on the north side of plaintiff's lands was southeasterly, down into Parker's lake. In view of the topography of the country, this was probably so; but this is wholly immaterial in view of the fact, also found by the court, and supported by the evidence, that this had ceased long before the settlement of any of the lands in the vicinity, since which time the natural flow has been ³⁴ to the west, as already stated. There was no evidence as to whether it was practicable for plaintiff to adopt means to guard against the danger of this overflow eastward upon his meadows, or, if so, at what expense. The situation, however, would seem to indicate that a feasible preventive would be to either widen and deepen the outlet to the westward, or raise the easterly bank of the bog or pond.

The trial court granted a mandatory injunction requiring the defendants to fill up the ditch to the depth of two feet, from the south end of the big marsh or pond down to the third or lowest culvert, and thus restore the condition of things as it existed before any artificial excavations were made.

It will be seen from the foregoing statement of facts that the defendants have not diverted any of these waters from their natu-

ral course. All that they have done was in aid of the natural and only system of drainage. The only effect of their acts in deepening the natural outlet of this marsh or pond is to cause more of these waters to flow out, and thus leave less of them standing on their lands than would have remained there had things continued in their natural condition. In view of the topography of the country, it is also apparent that this was the only means by which defendants could have drained their lands. It is also to be noted that the object and effect of what they did was not simply to drain and reclaim the bed of a permanent and well-defined lake, but to lower the water in a marsh or pond of variable size, so as to drain the adjacent low and swampy lands, and thus render them fit for use as pastures or meadows.

The decision of the trial court seems to be mainly predicated upon the assumption that it was the deepening of the outlet and natural waterway of the big pond or swamp which caused the water to overflow to the southeast, over plaintiff's meadows. It is far from clear that this assumption is correct. Of course, the effect of thus deepening the outlet and channel would be to cause more water to flow out of the swamp or pond. But this overflow would commence sooner. It would commence whenever the water in the marsh rose to the level of the outlet, and continue until it fell to that level. After the marsh or pond was once filled, if the rains ²⁵ continued, the overflow would be the same whether the outlet remained at its original level or was lowered two feet by artificial excavations. So far as appeared, the water had never before overflowed easterly, over plaintiff's meadows; and, for anything that appears, the overflow on this occasion might have occurred, as the result of the unusual and extraordinary rainfall, even if the outlet and waterway had been left in their natural condition. It would seem self-evident that this might occur if the rains were sufficiently heavy and continued long enough. Therefore, it does not seem to us that the evidence furnishes any sufficient basis for the assumption of fact upon which the decision of the court must be sustained, if at all; for, unless the deepening of the natural waterway was the efficient and proximate cause of the overflow easterly, upon plaintiff's meadows, the plaintiff would not, under any view of the law, have a cause of action. No innovation or change in the distribution of water from a superior to an inferior tenement is material or the subject of condemnation, unless it works injury to the inferior estate: *Peck v. Goodberlett*, 109 N. Y. 180.

But we shall concede (which is the most that can be claimed for the evidence) that, so long as the natural channel for this water on plaintiff's land is left in its present condition, the acts of the defendants in deepening the channel on their lands will, at rare intervals, in case of extraordinary or unusual rainfalls, render the water more liable to overflow to the east, upon plaintiff's meadows, or to flow there in larger quantities, than they otherwise would. Still, under the modified common-law rule adopted in this state, defendants have done nothing but what they might lawfully do in the reasonable improvement of their own lands. The small inland lakes of this state are in some respects *sui generis*. Some of them are fed mainly by surface waters, and yet are permanent and well-defined lakes. We do not wish to be understood as holding that such lakes continue to be surface waters. But, on the facts of the present case, we hold that the waters which collected on the defendants' lands never lost their character as surface waters. This so-called "pond" or "lake" was merely a large marsh, in which large quantities of surface water collected at certain seasons of the year, and mostly disappeared at others, but remained long enough to render the lands upon which they rested, and the adjacent lowlands, unfit for use. What defendants have done amounted merely to aiding³⁶ the natural drainage of these waters. They have done nothing more than was reasonably necessary in the interests of good husbandry. They have adopted the only feasible or possible means of draining their lands. In doing this, they have inflicted no unnecessary injury upon the plaintiff. The benefit to them appears to be very great as compared with any injury likely to result to plaintiff from their acts. There is nothing to indicate that plaintiff might not readily protect himself from any injury liable to result from defendants' acts.

The case is more than covered by *Sheehan v. Flynn*, 59 Minn. 436. It is true that in that case the collection of surface water was less than in the present case; also, that there the water entirely dried up in the summer; while here, in the natural condition of things, some of the water stood the year round in the lowest part of the marsh. But, on the other hand, in the *Sheehan* case none of the water overflowed upon the plaintiff's land until the ditch was dug, and it then had no outlet from plaintiff's land, but rested there; while here the waters had a natural outlet and channel to and across plaintiff's land, and thence into Gleason's lake, and finally into Lake Minnetonka. This whole question of the disposition of surface waters has been so recently and

so fully considered in the Sheehan case that it is unnecessary to discuss the question here at any length.

Much can be said both for and against the common-law rule on the subject. An argument often used, and at first sight plausible, is that a man ought not to be permitted to cast upon his neighbor's land a burden which nature has imposed upon his own. But the maxim that a man must use his own so as not to injure another is only true in a limited and qualified sense. No person has the absolute and unqualified legal right to the use of his own property unaffected by the reasonable use by his neighbor of his property. The use by my neighbor of his property in a particular way may discommode and injuriously affect me in the enjoyment of my property; but, if his use is a reasonable one, I must submit to any resulting inconvenience. The question, after all, is really one of reasonable use; and the common-law rule as to surface water is but an application of the universal rule, perhaps somewhat enlarged in the interests of agriculture and the improvement of lands.

Under the facts of this case, the plaintiff ought not to be allowed ³⁷ to stand in the way of defendants' reasonable improvement of their lands, by aiding nature in their drainage.

Order reversed, and new trial granted.

WATERS AND WATERCOURSES—SURFACE WATER RIGHTS OF LANDOWNERS.—Surface water caused by the falling of rain or the melting of snow, and that escaping from running streams, is regarded as a common enemy, against which anyone may defend himself, though in so doing he inflicts injury upon another: *Cass v. Dicks*, 14 Wash. 75; 53 Am. St. Rep. 859, and note; *Beatrice v. Leary*, 45 Neb. 149; 50 Am. St. Rep. 546, and note. Every proprietor may lawfully improve his property by doing what is reasonably necessary for that purpose, and, unless guilty of some act of negligence in the manner of its execution, is not answerable to an adjoining proprietor, although he may thereby cause surface water to flow on the premises of the latter to his damage: *Beatrice v. Leary*, 45 Neb. 149; 50 Am. St. Rep. 546, and note; *Missouri Pac. Ry. Co. v. Keys*, 55 Kan. 265; 49 Am. St. Rep. 249, and note.

SVENDSEN v. STATE BANK.

[64 MINNESOTA, 40.]

BANKS AND BANKING—REFUSAL TO HONOR CHECK—SLANDER IN BUSINESS—DAMAGES.—The wrongful refusal of a bank to honor the check of a trader or merchant, when it has sufficient of his funds on deposit to pay such check, is a slander to him in his business for which he is entitled to recover compensatory damages.

J. Rustgard, for the appellant.

Smith, McMahon & Mitchell, for the respondent.

⁴¹ CANTY, J. During the time covered by the transactions hereinafter mentioned plaintiff was carrying on a mercantile business in Duluth, and the defendant was carrying on a banking business in that city. Plaintiff was a customer of the defendant, and kept a deposit in its bank, which he was in the habit of drawing out by means of checks, and which was held by the bank for the purpose of paying such checks. He had drawn on the bank a check for forty-two dollars and fifteen cents in favor of one firm, and another for fifty-four dollars and sixty cents in favor of another firm. These checks came through the clearinghouse, and were on October 20, 1893, presented for payment to the bank, and payment was refused for want of funds, though the plaintiff then had on deposit in the bank, subject to his check, the sum of two hundred and thirty-five dollars and twenty-two cents. The checks were returned through the clearinghouse to the holders thereof. The reason why the bank refused to honor the checks was that it had by mistake charged up to plaintiff's account a note for ⁴² three hundred dollars made by him, and held by it, which was not yet due, but which the bank by mistake supposed was due. This action was brought to recover damages for the refusal to pay the checks. Plaintiff did not allege or prove any special damages, but claimed to be entitled to recover substantial general damages. The court below on the trial ruled against him on this point, and ordered a verdict in his favor for nominal damages, to which he excepted, and from an order denying a new trial he appeals.

It is held by the authorities that in such a case the plaintiff's recovery is not limited to nominal damages, but he is entitled to recover general compensatory damages: *Rolin v. Steward*, 14 Com. B. 595; *Schaffner v. Ehrman*, 139 Ill. 109; 32 Am. St. Rep. 192; *Bank of Commerce v. Goos*, 39 Neb. 437; *Patterson v. Marine*

Nat. Bank, 130 Pa. St. 419; 17 Am. St. Rep. 779; 3 Am. & Eng. Ency. of Law, 225; 1 Sutherland on Damages, sec. 77.

The case of *Patterson v. Marine Nat. Bank*, 130 Pa. St. 419, 17 Am. St. Rep. 779, seems to place the right to recover more than nominal damages in such a case on the ground of public policy, but the other cases place it rather on the ground that the wrongful act of the banker in refusing to honor the check imputes insolvency, dishonesty, or bad faith to the drawer of the check, and has the effect of slandering the trader in his business. We are of opinion that the recovery of more than nominal damages can, on sound principle, be sustained on the latter ground, where the drawer of the check is a merchant or trader. To refuse to honor his check is a most effectual way of slandering him in his trade, and it is well settled that to impute insolvency to a merchant is actionable per se, and general damages may be recovered for such a slander: *Townshend on Slander and Libel*, sec. 191; *Odgers on Libel and Slander*, 80 (78).

Respondent's position that an action of tort cannot be maintained in such a case as this, and that plaintiff's only remedy is an action on contract, in which only nominal damages can be recovered, is not sustained by the authorities.

The case of *Marzetti v. Williams*, 1 Barn. & Adol. 415, cited by him was an action in tort. The amount of the verdict is not reported, but it is very evident that it was only for a nominal amount, and the only question before the court was whether or not the defendant was entitled to a nonsuit because the action should have been brought ⁴³ on contract not in tort. The court held against the defendant on that point, and what is said beyond this is merely obiter, and was so regarded in the subsequent case of *Rolin v. Steward*, 14 Com. B. 595. In *Prehn v. Royal Bank*, L. R. 5 Ex. 92, the only question was whether plaintiffs were entitled to recover of the bank certain sums which they had paid to save their credit by procuring money elsewhere to pay bills drawn by them on the bank, and to prevent the bills from going to protest after the bank had notified them that it would not pay these bills, although it had funds in its hands for that purpose. It was held that they could recover the full sum so paid by them to preserve their credit, and the authority of *Rolin v. Steward*, 14 Com. B. 595, was expressly recognized. The case of *Brooke v. Tradesmen's Nat. Bank*, 69 Hun, 202, 23 N. Y. Supp. 802, was an action by the receiver of an insolvent whose check had been wrongfully dishonored by the bank. The plaintiff was forced to concede that he could not maintain an action of tort, or recover

any damages but such special damages as he alleged and could prove in an action for breach of a contract. These are all the cases cited which have any bearing on the case. These are the only questions raised worthy of consideration.

It necessarily follows from the foregoing conclusions that the order appealed from must be reversed. So ordered.

BANKS AND BANKING—REFUSAL TO PAY CHECK—DAMAGES.—If an indorsed check is sent for collection by due course of mail to the bank on which it is drawn, and in which the drawer has on deposit at the time sufficient funds to pay it, the return of the check unpaid, due solely to the negligent mistake of an employe of the bank, is, in effect a refusal to pay and renders the bank liable to the drawer for substantial, temperate, compensatory damages, without proof of special or actual damages: *Atlanta Nat. Bank v. Davis*, 96 Ga. 334; 51 Am. St. Rep. 139, and note; *Patterson v. Marine Nat. Bank*, 130 Pa. St. 419; 17 Am. St. Rep. 778. See, also, extended note to *In re Franklin Bank*, 19 Am. Dec. 418-431.

STATE v. CHAPEL.

[64 MINNESOTA, 130.]

CONSTITUTIONAL LAW—GAME LAWS.—A statute making it "unlawful for any person to consign by common carrier to any commission merchant or sale market, at any time, any elk, moose, caribou, or deer, or any part thereof, except the skin or head," is not unconstitutional as depriving citizens of their privileges and property without due process of law.

GAME LAWS.—THE STATE, IN THE EXERCISE OF ITS POLICE POWER, may impose such limitations and restrictions upon the right of property in game, after it is taken or killed, as tends to prevent its extermination or undue depletion.

Akers & Williams, for the appellant.

P. Butler and W. E. Bramhall, for the respondent.

¹³⁰ MITCHELL, J. Appeal from an order of the district court denying the petition of the relator, on a writ of habeas corpus, for his ¹³¹ discharge from the custody of the respondent, as sheriff of Ramsey county.

The relator is held under a commitment issued upon a conviction of a violation of Laws 1893, chapter 124, section 9, as amended by Laws 1895, chapter 115, section 5, which provides "that it shall be unlawful for any person to consign by common carrier to any commission merchant or sale market, at any time, any elk, moose, caribou, or deer, or any part thereof except the skin or head." He claims that this provision is unconstitutional, as class legislation, and is in violation of both the federal and state

constitutions, because it deprives the citizen of his privileges and property without due process of law.

An analysis of the provision shows that there is no discrimination between persons in the matter of killing game, or in the use or transportation of it after it is killed. Any one may kill or buy it during the open season, and every one is allowed equal privileges for shipping it after it is thus acquired; also, when a common carrier is not used as the means of transportation, every one is allowed to ship it to any one for any purpose; also that, when it is not consigned to a commission merchant or sale market, any means of transportation, either a common or a private carrier, may be used. The only restriction is that, when consigned to a commission merchant or sale market—that is, to one handling game for sale—it cannot be consigned by a common carrier. In its practical working, the only effect of the law is to limit the means of transportation of game killed for the market, and consigned to commission men for sale, either for themselves or on account of the consignors. The result would be to prevent, in a great measure, such game from becoming an article of general commerce, and thereby materially decrease the amount killed. The object of the statute, as its title indicates, is to protect and preserve the game of the state from extinction or undue depletion. The most usual method adopted to effect such an object is to limit in some way the amount of game killed. One way of accomplishing this is to limit the open season. But this not always effectual; for, even if the open season is reduced to the shortest reasonable period, the number of hunters, especially those who hunt for the market, may be so great as to unduly deplete the game even during that period. Another method resorted to is to limit the amount that any one person may kill, ¹³² and to restrict the modes of killing. Experience proves that such provisions are difficult to enforce, because of the difficulty of procuring the evidence of their violation, especially in the case of large game, which is usually killed in the secrecy of the forest.

It is a matter of common knowledge that the rapid depletion of game, especially large game, such as deer, is caused by its indiscriminate slaughter by "pot hunters," who kill it for the general market. The practical question which confronted the legislature was how to prevent the undue depletion of such game from this cause. This could only be done by adopting some means that would, as far as possible, prevent the game from becoming a subject of commerce in the general market, and thereby reduce the amount that would reach such market. It is also a matter of

common knowledge that the facilities for regular, rapid, and cheap transportation furnished by common carriers, especially railways are practically essentially to the business of these pot hunters, and furnish its chief stimulant and aid, and that, without this method of transportation, hunting for the general market would be quite limited, and the amount of game killed very much reduced. Hence, the enactment of the provision under consideration. The legislature has a very large discretion in such cases as to the means to be adopted to effect the desired object, and, if these means do not violate any constitutional provision, the courts will never set up their judgment against that of the legislature as to whether they are the best or most equitable means that might have been adopted. Neither will the courts declare a law invalid, unless it is in plain violation of some express provision of the constitution. All reasonable doubts must be solved in favor of the legislative action.

The provision under consideration certainly has a natural and reasonable tendency to preserve the game of the state from extinction or undue depletion, and we cannot say that the restriction upon the method of transporting game consigned to commission men or sale markets is arbitrary, or not founded upon an apparent natural reason, suggested by the necessities of the case. If the law is otherwise unobjectionable, the mere fact that, in its operation, it may incidentally deprive common carriers of some business which they would otherwise get, or may render it more difficult for those to ¹³³ procure game in the market who live at a distance from those parts of the state where it is killed, will not render the law invalid. If this restriction was sought to be applied to some article in which the citizen had an absolute and unlimited right of private property, it could not be sustained. But wild game, before it is reduced to possession, belongs to the state in its sovereign capacity, in trust for the whole public. Hence, in the exercise of its police power, the state may impose such limitations and restrictions upon the right of property in it, after it is taken or killed, as will tend to prevent its extermination or undue depletion: *State v. Rodman*, 58 Minn. 393. One who kills a deer does not acquire an absolute and unlimited right of property in it. His right of property, from its very inception, is subject to all the limitations imposed upon it by the police laws of the state, one of which is the restriction upon the mode of transportation under consideration. Hence, no question of taking private property without due process of law is involved.

Order affirmed.

GAME LAWS—CONSTITUTIONALITY OF.—A statute making it criminal for a person to have in his possession or to purchase or sell certain game birds or animals at the times designated therein is constitutional, though applicable to birds or animals killed outside of the state where such killing was unlawful: *Roth v. State*, 51 Ohio St. 209; 46 Am. St. Rep. 566; *Ex parte Maler*, 103 Cal. 476; 42 Am. St. Rep. 129, and monographic note.

GAME LAWS—AUTHORITY OF STATE IN EXERCISE OF POLICE POWER.—In the exercise of the police power of the state, it may prohibit the taking of wild game and any traffic or commerce in it, if deemed necessary for its protection or preservation, or for public good: *Ex parte Maler*, 103 Cal. 476; 42 Am. St. Rep. 129, and monographic note; *American Exp. Co. v. People*, 123 Ill. 649; 23 Am. St. Rep. 641, and note.

WHEELER v. PATERSON

[64 MINNESOTA, 281.]

SURETYSHIP—OMISSION OF NAME OF SURETY FROM BOND.—The fact that the name of a surety who signs and seals a bond is not mentioned therein, does not affect its validity, if it is apparent from the face of the bond that he intended to be bound by its conditions.

SURETYSHIP—REPLEVIN BOND—OMISSION OF NAME OF SURETY ON BOND—JURISDICTION.—The fact that the name of a surety who signs and seals a replevin bond is omitted from the body thereof does not affect the jurisdiction of a justice's court to issue the writ of replevin and hear the case.

SURETYSHIP—REPLEVIN BOND—JURISDICTION.—The fact that the sureties on a replevin bond do not justify and that the bond is not acknowledged does not affect the jurisdiction of the justice's court to issue the writ of replevin and hear the case.

JUSTICE'S COURTS—JURISDICTION—ADJOURNMENT.—If, after the pleadings are closed, a justice of the peace adjourns the case for three days as authorized by statute, he does not lose jurisdiction to hear the case on the adjourned day by reason of the fact that he has omitted to state in his docket upon whose motion the adjournment was had.

Ward, Dunn & Ward, for the appellant.

Voreis & Mathwig, for the respondent.

²⁸¹ **START, C. J.** This is an action of replevin, originally commenced in justice court, to recover possession of an office desk and an iron safe. Upon the return day of the writ, January 24th, the plaintiff appeared and filed his complaint; but the defendant appeared specially, for the purpose only of objecting to the jurisdiction of the court, and moved to dismiss the action for the alleged reason that the court was without jurisdiction in the premises, because no valid replevin bond had been given. The justice ²⁸² denied the motion, and allowed the plaintiff until January 27th, at 10 o'clock A. M., to furnish a proper bond,

to which time the case was adjourned; but upon whose motion the adjournment was made, the record is silent. The defendant duly excepted to these rulings. On January 27th the plaintiff filed a further replevin bond, which, in form and substance, complied with the statute, and was approved by the justice. The cause was tried on that day, and judgment entered for the plaintiff, from which the defendant appealed to the district court, and from the judgment of that court, affirming the judgment of the justice court, he appealed to this court.

The defendant's assignments of error are included in two general claims: 1. That the original replevin bond was void; 2. That the adjournment of the cause for three days worked a discontinuance, and jurisdiction thereafter to hear the case was lost.

1. The original bond complied with the statute, in form and substance, except that the name of one of the two sureties who signed and sealed the bond was omitted, in the body thereof. For this reason the defendant claims that there was but one surety on the bond; therefore it is void as a replevin bond, because the statute requires a bond with two sureties, at least, as a jurisdictional requisite to the issuing of the writ by the justice.

If both sureties are liable on this bond, the claim of the defendant falls. They are both so liable, for it is apparent on the face of the bond that the omission of the name of one of the sureties in the body of the bond was a clerical mistake, and that such surety intended to be bound by the obligations of the bond. Its commencement and conclusion are in these words: "Know all men by these presents, that we, Edw. J. Wheeler, as principal, and G. M. Wheeler and ———, are held and firmly bound unto F. A. Paterson. . . . In testimony whereof, we have hereunto set our hands and seals." This bond is signed and sealed by the persons named in the body thereof, and by another surety, Frank A. Day, who is not named therein. Now, Mr. Day signed this bond with some intent, and for some purpose. What were they? He answers the question over his own signature; for he expressly declares that, in witness of his obligation to perform the conditions of the ²³³ bond, he signs and seals it. He and the other parties signing the bond are the "we" referred to in the body thereof. The fact that the name of a surety who signs and seals a bond is not mentioned therein does not affect its validity, if it is apparent from the face of the bond that he intended to be bound by its conditions: *Campbell v. Rotering*, 42 Minn. 115; *Cobbey on Replevin*, sec. 1290. The cases of *Blake v. Sherman*, 12 Minn. 305 (420), and *State v. Austin*, 35 Minn. 51, relied on by

the defendant, are not in point. In the former case there was no attempt to give a bond with two sureties, as required by statute, but an undertaking signed by only one surety was made; and it was held that this was not a compliance with the statute, but that the defect could be cured by filing such a bond as the statute required. In the latter case the bond was not signed by the principal, and it was held that the sureties were not bound.

The defendant also claims that the bond is void because the sureties did not justify and the bond was not acknowledged. This omission did not affect the validity of the bond: *Gale v. Seifert*, 39 Minn. 171. The acknowledgment and justification are no part of the bond, and there is no statute requiring them to be indorsed on the bond. There is, however, a rule of the district court requiring this to be done, but the rule does not apply to a justice court.

2. The justice did not lose jurisdiction of the case by adjourning the case, after the pleadings were closed, for three days. "When the pleadings are closed, the justice, on the application of either party, shall adjourn the case for not exceeding one week": Gen. Stats. 1894, sec. 4990. This statute authorizes the justice, on the application of the plaintiff, without the consent of the defendant, and without showing cause, to adjourn the case, not exceeding one week: *O'Brien v. Pomroy*, 22 Minn. 130. The defendant appeared specially to challenge the jurisdiction of the court. He did not answer, and had no intention of answering. Hence the pleadings were closed before the adjournment. The defendant, however, claims that the application for the adjournment was not made by the plaintiff, but that the justice adjourned the case on his own motion. As already suggested, the justice did not state in his docket at whose request the case was adjourned: Gen. Stats. 1894, sec. 234 4961, subd. 5. There is no presumption that the case was adjourned on the justice's own motion, but the presumption is in favor of the regularity of the proceedings, and that the adjournment was on the application of the only party in court—the plaintiff. The omission to so state in the docket does not render the judgment erroneous: *Meister v. Russell*, 53 Minn. 54; *Smith v. Victorin*, 54 Minn. 338. Judgment affirmed.

SURETYSHIP—CONSTRUCTION OF CONTRACT—RELEASE OF SURETY.—A surety has the right to stand upon the strict terms of his obligation, when such terms are ascertained, and his liability is not to be extended by implication beyond those terms. But this rule of strict construction in no way interferes with the use of the ordinary tests by which the actual meaning and intention of contract-

ing parties are primarily determined: *Shreffler v. Nadelhoffer*, 133 Ill. 586; 23 Am. St. Rep. 626, and note; *First Nat. Bank v. Gerke*, 68 Md. 449; 6 Am. St. Rep. 453, and extended note. As to what will release or discharge a surety, see extended note to *Scott v. Fisher*, 23 Am. St. Rep. 691.

JUSTICE OF PEACE—JURISDICTION—HOW LOST.—A justice loses jurisdiction over a cause where he adjourns it one week without specifying the hour of the day or the place to which it is adjourned: *Crandall v. Bacon*, 20 Wis. 639; 91 Am. Dec. 451, and note. See, also, *Talbot v. Kuhn*, 89 Mich. 80; 28 Am. St. Rep. 273; *Hunt v. Wickwire*, 10 Wend. 102; 25 Am. Dec. 545, and note.

RATZER v. BURLINGTON, CEDAR RAPIDS, AND NORTHERN RAILROAD COMPANY.

[64 MINNESOTA, 245.]

CARRIERS—BILLS OF LADING—INNOCENT PLEDGEE.—If a shipper consigns goods to himself and receives a bill of lading to that effect from the carrier, who delivers them with a proper way bill to a connecting carrier, who, at the shipper's request, delivers them to him at an intermediate point in transit without requiring the cancellation or surrender of the bill of lading, and the shipper, before the goods could have arrived at their original destination, pledges such bill of lading in the usual course of business to an innocent pledgee for value, the connecting carrier is liable to such pledgee for failure to deliver the goods at their original destination, and is estopped from showing such intermediate delivery to the original shipper.

J. F. McGee, for the appellant.

A. E. Clarke and W. F. Booth, for the respondent.

245 CANTY, J. The Morrison Grain & Lumber Company shipped three carloads of oats, two from Britt, and one from Forest City, Iowa, to New York City. One of these cars was shipped on January 5, and the other two on January 7, 1895. A bill of lading was issued for each car by the initial carrier. In each bill the shipper is named as consignee, with the addition, "Notify John Ratzer," and the destination named is New York City. The initial carrier transported the cars to Livermore, Iowa, and there delivered them (with proper waybills, showing New York to be the destination) to the defendant, the next connecting carrier, with which and a subsequent carrier it had through traffic arrangements. The defendant carried the cars on its line toward their 246 destination until they reached Morrison, Iowa, on January 8th or 9th, and there delivered all of the oats (of the value of thirteen hundred and thirty-six dollars) to the shipper, on its demand, without requiring a surrender or can-

cellation of the bills of lading. The shipper at this point converted the oats to its own use. Within a day or two after the oats were so delivered at Morrison, the shipper indorsed each of the bills of lading, "Deliver to the order of John Ratzer," and signed them. The shipper also drew drafts on said Ratzer, this plaintiff, in favor of the Bank of Reinbeck, for the amount of the purchase price of the oats, attached the drafts to the bills of lading, and delivered all of the same to the bank, which cashed the drafts in good faith, in the regular course of business, relying on the attached bills of lading. The bills of lading were, in the regular course of business, forwarded by the bank to New York, and presented to Ratzer, a commission merchant there, dealing in grain, who on January 14 and 16, 1895, in the regular course of business, paid the drafts in good faith, relying on the attached bills of lading which he then and there received. If the three cars of oats had continued to New York, their destination, in the usual course of transportation, they would have arrived there between January 23d and 30th. The shipper, the Morrison Company, is wholly insolvent.

Plaintiff brought this action to recover eight hundred and four dollars and ninety-four cents, the amount so advanced by him on the faith of the bills of lading. The case was tried by the court below, without a jury. The court found all of the foregoing facts, and thereon ordered judgment for defendant. From the judgment entered thereon plaintiff appeals, and urges, as a ground for reversal, that the judgment is not sustained by the findings of fact.

We are of the opinion that, on the facts found, the plaintiff is entitled to judgment. A vast portion of the produce of this country is moved from the agricultural districts to the commercial centers and the seaboard by the aid of advances made on the security of such bills of lading. A well-established custom has grown up in commercial circles by which such bills of lading are treated as the symbols of title to the property in transit, are taken as security for money advanced, and indorsed and delivered as a transfer of the property. This is well understood by the railroad companies ²⁴⁷ and every one else. To allow the railroad companies to ignore this custom would be to destroy the custom itself. This would cause great hardship, revolutionize business methods, and drive all buyers and shippers of small means out of the business, as they could no longer give ready and available security on commodities in transit. and thereby turn their limited capital sufficiently quickly and often to enable them to do much

business. This, in turn, would destroy competition, and leave the business in the hands of a few concerns with unlimited capital. Neither have the railroad companies any right to ignore this custom. On the contrary, it must be held that these companies have been doing business with reference to this custom as much as the shippers themselves and the consignees, banks, commission merchants, and others who are continually advancing money on the faith of the security of these bills of lading. The effect of this custom, independent of General Statutes 1894, section 7649, is to make bills of lading to some extent and for some purposes negotiable, and to give superior rights to innocent transferees for value in the usual course of business.

It is hardly necessary to cite authorities to the general proposition that, when a bill of lading is outstanding, the railway company delivers the goods at its peril, without a production of the bill of lading; and, if it so delivers them to some one other than the bona fide holder for value of the bill of lading, it is liable to him for conversion of the goods. What limitations or exceptions there may be to this rule we need not now consider. The following authorities show the universality of the rule as applied to transportation both on land and by water: See *The Thames*, 14 Wall. 98; *North v. Merchants' etc. Transp. Co.*, 146 Mass. 315; *Forbes v. Boston etc. R. R. Co.*, 133 Mass. 154; *Furman v. Union Pac. R. R. Co.*, 106 N. Y. 579; *City Bank v. Rome etc. R. R. Co.*, 44 N. Y. 136; *Pennsylvania R. R. Co. v. Stern*, 119 Pa. St. 24; 4 Am. St. Rep. 626; *Boatmen's Sav. Bank v. Western etc. R. R. Co.*, 81 Ga. 221; *National Bank of Chester v. Atlanta etc. Ry. Co.*, 25 S. C. 216; *Midland Nat. Bank v. Missouri Pac. Ry. Co.*, 132 Mo. 492; 53 Am. St. Rep. 505; *Armentrout v. St. Louis etc. Ry. Co.*, 1 Mo. App. 158; *Gates v. Chicago etc. R. R. Co.*, 42 Neb. 379; *Garden Grove Bank v. Humeston etc.* ²⁴⁸ *Ry. Co.*, 67 Iowa, 526; *Tindall v. Taylor*, 4 El. & B. 219. See, also, as bearing on the question: *Halsey v. Warden*, 25 Kan. 128; *Meyerstein v. Barber*, L. R. 2 Com. P. 38; *Lee v. Bowen*, 5 Biss. 154, Fed. Cas. No. 8,183; *Heiskell v. Farmers' etc. Nat. Bank*, 89 Pa. St. 155; 33 Am. Rep. 745; *Bass v. Glover*, 63 Ga. 745; *First Nat. Bank v. Dearborn*, 115 Mass. 219; 15 Am. Rep. 92; *Dows v. National etc. Bank*, 91 U. S. 618; *Conard v. Atlantic Ins. Co.*, 1 Pet. 386; *Weyand v. Atchison etc. Ry. Co.*, 75 Iowa, 573; 9 Am. St. Rep. 512, note. In the case of *National Bank of Commerce v. Chicago etc. R. R. Co.*, 44 Minn. 224, 20 Am. St. Rep. 566, it was held that the railroad company was not liable to the pledgee of the bill of lading. This was held solely on the ground that, as no

grain was delivered to the agent of the railroad company when he delivered the bill of lading, he had no authority to issue it, and the company was not liable. That question is not involved in this case.

Respondent contends that the consignee is only obliged to produce the bill of lading, but not to surrender it when receiving the goods; and that as the Morrison Company held the bill of lading when the oats were delivered to it in transit, and it did not negotiate the bill of lading until afterward, the defendant is not liable for so delivering the oats without requiring a surrender of the bill of lading. Whether or not the carrier can compel a surrender of the bill of lading when it delivers the goods it is not necessary here to decide. If the holder of the bill of lading insists on retaining it as a muniment of title, or for any other purpose, and has a legal right to do so, he can, at least, be required to produce it for cancellation, so that it will cease to be on its face a live bill of lading. And, in our opinion, it was the duty of the defendant at least to require this. It is immaterial that these bills of lading were negotiated to the bank and plaintiff after the oats were so delivered to the shipper. The bills were so negotiated before they had become stale, and even a considerable length of time before the oats would, in the ordinary course of transportation, have arrived at New York, their destination. The defendant permitted these bills to remain outstanding, with all the appearances of live, valid bills of lading. There was nothing to put anyone dealing with the Morrison Company on his guard.

²⁴⁹ The facts in the case are quite similar to those in the case of *Union Pac. Ry. Co. v. Johnson*, 45 Neb. 57, 50 Am. St. Rep. 540, where the defendant was held liable though the grain was delivered in transit at an intermediate point before the bills of lading were negotiated. In the case of *Wells, Fargo & Co. v. Oregon Ry. & Nav. Co.*, 32 Fed. Rep. 51, the railway company was also held liable to the pledgee of the bill of lading for delivering the goods to the shipper in transit. In *Armentrout v. St. Louis etc. R. Co.*, 1 Mo. App. 158, the railway company was held liable to the transferee of the bill of lading for delaying the transportation at the request of the shipper for a few days after it had issued the bill, thereby causing damage to the goods. In *Tindall v. Taylor*, 4 El. & B. 219, it was held that after the carrier had received the goods and issued a bill of lading for them to the shipper, and before the transit had commenced, it was not liable for refusing to redeliver the goods to him without a sur-

render of the bill. It was the duty of the defendant to see that the bills of lading were canceled when it redelivered the oats to the shipper, and its failure to perform that duty enabled the shipper to perpetrate a fraud on the bank and plaintiff. It is a case for the application of the doctrine of equitable estoppel, that, where one of two innocent persons must suffer by reason of the fraud of a third party, he by whose negligent act or omission such third party was enabled to commit the fraud ought to bear the loss. Under this rule, the defendant is estopped from showing that it delivered the goods to the shipper at the intermediate point, and is liable to plaintiff for failure to deliver them to him at the place of original destination. This disposes of the case.

The judgment is reversed, and judgment ordered for plaintiff, pursuant to this opinion.

CARRIERS—BILL OF LADING—MISDELIVERY.—The delivery of goods by a common carrier to a consignee is made at the peril of the carrier, unless, when made, the consignee surrenders the bill of lading either made or indorsed to himself. So, if a carrier delivers to the consignee, at an intermediate point, grain for which it has given a through bill of lading, without the surrender of such bill, it is guilty of misdelivery and conversion, for which it is liable to an indorsee for value of the bill of lading: *Union Pac. Ry. Co. v. Johnson*, 45 Neb. 57; 50 Am. St. Rep. 540, and note. See, also, *Midland Nat. Bank v. Missouri Pac. Ry. Co.*, 132 Mo. 492; 58 Am. St. Rep. 505, and note.

HAWKINS v. IRELAND.

[64 MINNESOTA, 339.]

INJUNCTION—JURISDICTION TO ENJOIN PROCEEDINGS IN ANOTHER STATE.—A court of equity in one state has power to restrain its own citizens, of whom it has jurisdiction, from prosecuting suits in the courts of other states and foreign jurisdictions, whenever the facts of the case make such restraint necessary to enable the court to do justice and prevent one citizen from obtaining an inequitable advantage over other citizens.

AN ASSIGNMENT FOR THE BENEFIT OF CREDITORS made by a debtor after garnishment proceedings have been commenced against him is voluntary, and not involuntary.

EQUITY—JURISDICTION TO ENJOIN PROCEEDINGS IN ANOTHER STATE AND TO DIRECT CONVEYANCE OF LAND THEREIN.—If a debtor, after making a deed to his wife, of land in another state which is fraudulent as to his creditors, makes an assignment for the benefit of the latter under the insolvency laws of the state of his domicile, and a creditor, who is a party to the insolvency proceedings, proves his entire debt therein, and then prevails upon the assignee in insolvency to commence an action as such, against the debtor and his wife, in the courts of such other state, to recover, as part of the trust estate, the land thus conveyed, after which such creditor also commences an action there against the same

parties to subject the same land to the payment of his debt, a court of equity in the state of the domicile of the debtor has jurisdiction to direct the wife of the debtor to convey such land to the assignee, and to enjoin such creditor from further prosecuting his suit in the other state, especially when all of the parties to the proceeding in equity, as well as all of the creditors of the debtor, are residents of the state of his domicile.

Rea, Hubachek & Healy, for the appellant.

J. B. Phelps, for the respondent.

²⁴¹ START, C. J. The material facts in this case, as disclosed by the record and the findings of fact of the trial court, are substantially as follows: The defendant the Irish American Bank is a corporation of this state, and the city of Minneapolis is its only place of business, and all of the parties hereto are, and have been during all the times hereinafter stated, citizens and residents of this state, and have appeared in this action. The defendant Amos P. Ireland and Arthur H. Ives, for eight months prior to February ²⁴² 27, 1895, were partners in business at Minneapolis under the firm name of Ives, Ireland & Co. On December 12, 1894, Amos P. Ireland and the firm, and each member thereof, were insolvent, and on that day Ireland caused to be conveyed to his wife, the defendant Eliza S. Ireland, a section of land in the county of Steele, in the state of North Dakota, then and for a long time previously owned by him, and of the then value of ten thousand dollars. The pretended consideration for such conveyance was the sum of three thousand three hundred and eighteen dollars, but the deed was in fact made for the purpose of defrauding the creditors of Ireland.

Afterward, and on February 27, 1895, an action, in which garnishee proceedings had been instituted, was pending against the firm of Ives, Ireland & Co., and on that day they made an assignment, under the insolvency laws of the state, to the plaintiff, of all of their firm and individual property wherever situated. The plaintiff accepted the trust, and promptly, at the request of the attorney of the defendant the Irish American Bank, commenced an action, filing a *lis pendens* against Ireland and his wife in Steele county, North Dakota, to set aside the fraudulent conveyance, and have the land applied to the payment of all debts which might be proven against the estate of the assignors. This action is still pending. When the assignment was made, the assignors were indebted to defendant the Irish American Bank in the sum of four thousand dollars, one-half of which was incurred prior to the making of the deed in question. Immediately after the mak-

ing of the assignment, the bank proved its full claim as a creditor in the insolvency proceedings, and has in all respects, from that time to this, assumed and claimed all the rights of a creditor in such proceedings, and has filed petitions and made motions therein. Among others it procured an examination of the insolvent in such proceedings by an order of the court, whereby the facts were disclosed in relation to the making of the fraudulent deed by Ireland to his wife. It has never withdrawn any part of its claim as proved against the estate of the assignors, and admits, in its answer to this action, that it always has claimed, and still claims, the rights of a creditor under the assignment proceedings.

After the plaintiff had commenced his action in North Dakota to set aside the deed, the defendant bank also commenced an action ³⁴³ against Ireland and wife in Steele county, North Dakota, in the nature of a creditors' bill, whereby it seeks to ignore the assignment, and subject the land in question to the payment in full of the greater part of its claim, to the exclusion of the other creditors of the insolvent. The basis of its action is a judgment recovered against Ireland in the district court of Hennepin county for three thousand five hundred dollars, being a part of the same debt which it had previously proved, and is still asserting in the insolvency proceedings. Thereupon the plaintiff, as assignee, brought this action to compel Mrs. Ireland to convey the land to him, to be disposed of in the insolvency proceedings as a part of the trust estate, and to enjoin the further prosecution by the bank of its action in North Dakota.

In its answer to this action, the bank alleges that on July 20, 1895, which was subsequent to the commencement of this action against it, it assigned its judgment against Ireland to W. C. McFadden. The trial court found that McFadden is a resident of North Dakota, and, further, that the evidence does not disclose that any consideration was paid by him for the judgment, and that the action in North Dakota is still being prosecuted in the name of the bank. There is no claim or suggestion in the record that there are any creditors of the assignors in North Dakota, except McFadden, or anywhere else outside of the state of Minnesota, or that there are any creditors who have not proved their claims in the insolvency proceedings, and become parties thereto. The record is simply silent as to these matters.

The trial court, as conclusions of law, found that the deed from Ireland to his wife was fraudulent and void as to creditors of Ireland and as to the plaintiff as assignee, and held that Mrs. Ireland

should convey the land in question, to be disposed of in the insolvency proceedings, for the benefit of such creditors, and, further, that the defendant bank be enjoined from further prosecuting its action in North Dakota. From an order denying its motion for a new trial the bank appealed. Neither of the Irelands have appealed. They submit to the decision of the court, and the presumption is, that they will obey its decree, and will convey the land to the plaintiff as directed, whereby the legal title to the land ³⁴⁴ will be vested in the plaintiff as assignee, for the purpose of the trust created by the assignment to him.

The appellant's assignments of error present the general question, Is the conclusion of law of the trial court, to the effect that the appellant be enjoined from further prosecuting its action in Steele county, North Dakota, correct? We answer the question in the affirmative.

1. The power of the court thus to enjoin the appellant is undoubted. All the parties to this action are citizens of this state, and subject to the jurisdiction of the court. The facts that the land is in another state, and the action which the appellant is forbidden to further prosecute is there pending, do not affect the question of the power of the court in the premises. The court, in such a case, simply commands its own citizens, not the courts of another state. A court of equity of this state has the power and will restrain its own citizens, of whom it has jurisdiction, from prosecuting suits in the courts of other states and foreign jurisdictions, whenever the facts of the case make such restraint necessary to enable the court to do justice, and prevent one citizen from obtaining an inequitable advantage over other citizens. "The court acts in personam, and will not suffer anyone within its reach to do what is contrary to its notions of equity, merely because the act to be done may be, in point of locality, beyond its jurisdiction": *Phelps v. McDonald*, 99 U. S. 298; *Cole v. Cunningham*, 133 U. S. 107; *Cunningham v. Butler*, 142 Mass. 47; 56 Am. Rep. 663, and note. No general rule can be laid down as to when the court ought to exercise this power, and enjoin a party from prosecuting a suit in a foreign jurisdiction. Each case must be ruled by its own facts. If they show that it is necessary and equitable to exercise the power in the orderly administration of justice, the court should enjoin the party, otherwise not.

2. The practical question, then, in this case is, Do the facts of this case justify the action of the trial court in exercising this power? The appellant claims, in substance, that it would be inequitable to enjoin it from prosecuting its action to subject the

land in question to the payment of its demand against the insolvent, ³⁴⁵ because it would result in depriving it of its right thus to secure payment of its claim, without any corresponding benefit to the plaintiff. If this reason is supported by the facts and law of this case, it affords a conclusive negative answer to the question, for in such a case it would be inequitable to exercise the power. The argument of the appellant in support of its conclusion is, briefly indicated, that the assignment to the plaintiff was an involuntary one; hence no title to any property of the insolvents situated out of the state ever passed to the plaintiff as assignee; that, in any event, the assignment has no extraterritorial force, and that the title of the assignee to the land in question will not be recognized by the courts of North Dakota as against any creditor of the insolvent, whether resident or nonresident. This argument, in view of the special facts of this case, is largely an abstraction, and rests in a measure upon a misconception of the law.

The assignment to the plaintiff is not an involuntary one, which, like an execution, has no extraterritorial force, but it is a voluntary assignment for the benefit of creditors. This proposition has been assumed to be correct in several cases in this court: *May v. Walker*, 35 Minn. 194; *Covey v. Cutler*, 55 Minn. 18. It is an admitted rule that general voluntary assignments for the benefit of creditors, valid by the laws of the state where made, pass the title of the assignor's personal property wherever situated, as against subsequent attaching creditors or lienors, unless their operation is limited or restrained by the operation of some local law or policy of the state where situated: *Covey v. Cutler*, 55 Minn. 18.

But, as to the assignor's real estate located in a state other than the one of his domicile and where the assignment is made, the manifest weight of authority, at least as to the number of the cases, is to the effect that the assignment does not pass the title to the real estate as against subsequent attaching creditors. Such an assignment, when executed and acknowledged and recorded in conformity with the laws of the state where the real estate is situated, passes the title thereto as against the assignor and his heirs: *Stahl v. Mitchell*, 41 Minn. 325. Why it should not also pass such title as against subsequent attaching ³⁴⁶ creditors and lienors, precisely as in the case of an assignment of personal property, it is difficult on principle to say. The usual reason given for the distinction between the two cases is, that each state has a fundamental policy as to the tenure of land within its limits,

and the title and disposition thereof must, of necessity, be subject exclusively to its laws. This is true, but it does not seem to be a satisfactory reason for the distinction. The validity of every conveyance of real estate must depend upon the laws of the state where the land is situated; but, when a transfer of real estate is in the form of a voluntary assignment for the benefit of creditors, and is executed, acknowledged, and recorded in accordance with the laws of the state where the land is situated, and it contravenes neither the public policy nor the laws of such state, why should it not convey the title as against subsequent creditors precisely as an ordinary deed absolute in its terms would, or an assignment of movables? *Bentley v. Whittemore*, 19 N. J. Eq. 462; 97 Am. Dec. 671.

It is not, however, our purpose to decide the question here suggested, because, for the purposes of this case, we assume the rule to be that an assignment for the benefit of creditors does not, as against the creditors of the assignor, pass the title to his real estate situated in a state other than the one where the assignment is made. Therefore, except for the special facts of this case, we should hold that the trial court erred in enjoining the appellant from prosecuting its action, for, if the appellant was not a party to the insolvency proceedings, and equitably estopped from claiming adversely to the plaintiff as assignee, and if there was a fair probability that the only result of its being so enjoined would be that some nonresident creditor would secure the land, and not the plaintiff, then clearly it would be inequitable to so enjoin the appellant. But this case is the reverse of the one supposed, as shown by the special facts we have already stated, and which need not be here repeated. It is sufficient to say that the fair conclusion from such facts is, that the appellant requested the plaintiff to take the necessary steps to secure the land in question for the benefit of all of the creditors of the insolvent, and that he did so; that it is a party to the insolvency proceedings, and has actively participated in the management of the same, and still ²⁴⁷ asserts its right to share in the assigned estate pro rata to the full amount of its claim; that the land in question will be conveyed, pursuant to the order of the court, to the plaintiff by the person who holds the legal title in trust for the insolvent's creditors; that, so far as aught appears, if the appellant is enjoined, all of the creditors will share equally in the land. These facts equitably estop the appellant from claiming the land adversely to the plaintiff, and thereby embarrass, if not defeat, him in his

efforts to secure the land for the creditors: *Chafee v. Fourth Nat. Bank*, 71 Me. 514; 36 Am. Rep. 345.

We base our decision upon this ground, and the special facts of this case. In view of such facts, it would have been inequitable, and a wrong to the other creditors of the insolvent, if the trial court had refused to enjoin the appellant. This is so, even if it be conceded that it is not entirely certain that, if the appellant is enjoined, the plaintiff will secure the land; for, under the circumstances of this case, the plaintiff, and not the appellant, is entitled to the benefit of any fair doubt in the premises.

The case of *Jenks v. Ludden*, 34 Minn. 482, relied upon by the appellant, is not in conflict with the conclusion we have reached. As already suggested, whether a court will exercise its power to restrain a citizen of this state from prosecuting an action in another state depends upon the facts of each particular case. Now the case at bar and that of *Jenks v. Ludden*, 34 Minn. 482, in their facts are the reverse of each other. In the latter case, the defendant, a citizen of this state, secured a first lien by attachment of the land of the assignors in the state of Wisconsin, and another creditor, a citizen of the latter state, secured in like manner a second lien on the same land. After these liens were secured, the assignors, citizens of this state, made an assignment for the benefit of their creditors under our insolvency laws. They were indebted to nonresident creditors, including ten thousand dollars to citizens of Wisconsin, in the sum of forty thousand dollars. The defendant never in any manner became a party to the insolvency proceedings, or in any manner asserted any claim against the estate of the insolvents in the hands of their assignee. Upon these facts, the assignee commenced an action in the courts of this state to restrain the defendant from prosecuting his attachment suit in Wisconsin, and ³⁴⁸ this court held that he ought not to be so restrained, for the conclusive reason that it was apparent that the only result of such action would be to deprive the defendant of his lien, lawfully obtained before the assignment was made, without any benefit to the assignee, because our insolvency laws would not operate to dissolve the attachment of the Wisconsin creditor, secured before the assignment was made, and, if the defendant could not proceed with his attachment, the land would fall to the Wisconsin creditor. "The effect would be merely to injure one of our own citizens, without accomplishing any benefit to other domestic creditors."

3. It is immaterial whether *McFadden* paid any consideration for the judgment. There is no claim that he was a purchaser in

good faith without notice, for it is an admitted fact that he purchased *pendente lite*. He is therefore bound by the result of this action.

Order affirmed.

EQUITY—SUITS IN ANOTHER STATE—INJUNCTION AGAINST.—A citizen of a state may be enjoined from commencing or prosecuting suits against his fellow-citizen thereof in the courts of another state, for the purpose of obtaining an advantage which he is not entitled to in the state of their common domicile: *Sandage v. Studabaker Bros. Mfg. Co.*, 142 Ind. 148; 51 Am. St. Rep. 105, and note; *Griggs v. Doctor*, 89 Wis. 161; 46 Am. St. Rep. 824. See extended note to *Cunningham v. Butler*, 50 Am. Rep. 663-666.

EQUITY—POWER OVER LANDS IN ANOTHER STATE.—A court of equity has power to compel a conveyance of lands in another state by a party over whose person it has jurisdiction: *Gardner v. Ogden*, 22 N. Y. 327; 78 Am. Dec. 192, and extended note. This power of equity is in consequence of its power over the person: Monographic note to *Newton v. Bronson*; 67 Am. Dec. 95-104. See, also, *Eaton v. McCall*, 86 Me. 346; 41 Am. St. Rep. 561, and note.

ASSIGNMENT FOR BENEFIT OF CREDITORS—WHEN VOLUNTARY.—Whether an assignment for the benefit of creditors is voluntary or involuntary must be decided from a consideration of the manner in which the transfer is made, and not what may be prescribed by statute as to the manner in which the property is to be disposed of by the assignee after the assignment: *Whitman v. Mast*, 11 Wash. 318; 48 Am. St. Rep. 874, and note.

KELLS v. NORTHWESTERN LIVESTOCK INSURANCE CO.

[64 MINNESOTA, 390.]

INSURANCE—LIVESTOCK—BREACH OF WARRANTY OF OWNERSHIP.—If the purchaser of an animal on credit gives his notes and a chattel mortgage to secure the purchase price, and then insures the life of the animal for the benefit of the vendor as his interest may appear, a provision in the contract of purchase, that if the animal shall die, the vendor shall take the insurance and give up the notes, does not constitute a breach of the policy of insurance in which the vendee is warranted to be the "sole, absolute, and unconditional owner of the animal insured."

INSURANCE—LIVESTOCK—NOTICE OF SICKNESS.—A provision in a livestock insurance policy, that the owner shall, in every case of sickness of an animal insured, notify the insurer thereof, by telegram, does not require such owner to so notify the insurer of the temporary sickness of an insured animal lasting but a few moments.

NEGOTIABLE INSTRUMENTS—POSSESSION AS BADGE OF OWNERSHIP.—Possession by the payee of a note specially indorsed to him by a third party is *prima facie* evidence that such payee is the owner of the note.

E. B. Graves, for the appellant.

G. W. Stewart, for the respondent.

³⁹¹ CANTY, J. On February 25, 1893, N. P. Clarke was the owner of a stallion, which on that day he sold to one Franzikus for one thousand dollars, for which Franzikus gave his notes secured by a chattel mortgage on the horse. On March 14, 1893, defendant insured Franzikus for one year against loss by death of the horse by disease or accident, to the amount of five hundred dollars; loss, if any, payable to Clarke "as his interest may appear as mortgagee." On January 4, 1894, during the time covered by the policy, the horse died. This action was brought by Clarke to recover on the policy. He subsequently made an assignment for the benefit of his creditors, and his assignee, Kells, was substituted as plaintiff. A jury was waived, and the court found plaintiff was entitled to judgment for five hundred dollars and interest. From an order denying its motion for a new trial, defendant appeals.

1. The bill of sale of the horse from Clarke to Franzikus contains the following provision: "If the said horse should die before July 1, 1895, the said N. P. Clarke is to take the insurance, which is five hundred dollars, and give up the notes. The horse is to be kept insured in N. P. Clarke's favor for five hundred dollars." It is urged by appellant that these facts constitute a breach of the warranty in the insurance policy, which warrants that Franzikus is "the sole, absolute, and unconditional owner of the livestock insured." We do not see that the above-quoted provision in the bill of sale caused Franzikus to be any the less the sole and absolute owner of the horse than he would be if that provision had never existed. The provision simply gave him an additional indemnity against loss in case of the death of the horse. Neither can we see that, as claimed by appellant, this provision made the policy of insurance a wagering contract, or deprived Franzikus of an insurable interest.

2. But, even if the existence of the provision was a breach of this or some other condition in the policy, there is evidence that the breach was waived, as the evidence tends to prove that, at the time the policy was issued, defendant's agent, Seaton, had knowledge of this provision in the contract of sale, and made no ³⁹² objection to it: See *Anderson v. Manchester Fire Assur. Co.*, 59 Minn. 182; 50 Am. St. Rep. 400; *Brandup v. St. Paul etc. Ins. Co.*, 27 Minn. 393.

3. The insurance policy contains this condition: "Fourth. That the said insured has agreed and is required to use all due diligence, precaution, and care in the use, and for the safety, health, and preservation, of said livestock, and, in case of sick-

ness or accident, agrees to promptly summon to his aid the best veterinary surgeon to be had in the vicinity, or, if none can be had, to otherwise provide the best available care and attention; and he shall in every case at once notify this company, at its home office, in Des Moines, Iowa, by telegram, of the fact of such sickness or accident, otherwise this policy shall be void."

The horse was more or less sick on November 15, 1893, some seven weeks before he died. Appellant was not notified of this sickness, and claims that the failure to notify it avoided the policy. We cannot hold that a failure to notify the insurer of any sickness, however slight and temporary, especially when it passes away quickly and does not recur again, is sufficient to avoid the policy.

The evidence as to how sick the horse appeared to be on that occasion is conflicting. The witness Franzikus testified as follows: "My boy got up in the morning, went out to the stable, like he usually does, came back, and said, 'Pa, Van Guard looks like being sick.' Then I went to the stables, and saw the horse acted sick; and I went to Dr. Cooley, and got him there as quick as I could. When he came there, I guess Mr. Connelly was there, and they wanted to pull the horse out of the stable; and they led the horse to the door, and by going out of the stable, when he stepped over there—there was a manure pile—and when he stepped over there he kind of laid down; and Dr. Cooley took out his knife and bled the horse, and as soon as he bled him the horse got right up again; and I took him into a long stable, twenty-four by fifteen, and put him in there, and covered him up nicely, and in ten minutes I tried him to eat, and he did eat. Q. Did you ever notice anything wrong with the horse after that, till he died? A. No, sir; he ate regular, and I put him in the yard like the other horse, as usual, with the mare and colt. . . . He trembled a little when he was sick, but afterward nobody saw anything about it." The witness repeatedly testified that the horse was sick at this time only a few minutes, or not longer than ten minutes.

323 The trial court was justified in finding from this evidence that the sickness was very slight, and of very short duration. But the court has failed to find on the question at all. It is true that the court found that the horse "was sick, with the sickness which caused its death, for three or four days before it died." Appellant's counsel contends that by this finding "the court can refer to nothing else but the sickness in November, because there

is no testimony as to any other sickness." We cannot so hold. It is true that there is no evidence that the horse was attacked by sickness from the time he was sick in November until one hour before he died, but we cannot, as counsel contends, vary the meaning of the findings by a reference to the evidence. Counsel does not predicate anything on the failure to give notice of any sickness commencing immediately or shortly before the death of the horse. He simply insists that the finding refers to the November sickness, and that there was a failure to give notice of the November sickness.

There is nothing in the point that it does not appear that Franzikus was the owner of the horse at the time of the death, or that the horse died in this state, or the point that it is not to be presumed that Clarke was the owner of the notes.

4. The notes were produced at the trial, and offered in evidence by plaintiff, and at that time were indorsed as follows: "Pay Clarke & McClure, or order. [Signed] N. P. Clarke." Appellant cites *Welch v. Lindo*, 7 Cranch, 159, to the effect that it must be presumed that Clarke & McClure are still the owners of the notes. In answer, we will say that that case seems to have been overruled by *Dugan v. United States*, 3 Wheat. 172, and the weight of authority holds that possession by the payee of a note indorsed specially by him to a third party is *prima facie* evidence that such payee is the owner of the note: See 1 Daniel on Negotiable Instruments, sec. 576, and cases cited.

This disposes of all the questions in the case worthy of consideration, and the order appealed from is affirmed.

UPON APPLICATION FOR REARGUMENT.

CANTY, J. The only point in appellant's petition for reargument, worthy of consideration, is that there is evidence in the case (other ³⁹⁴ than that quoted in the opinion) tending to prove that the sickness of the horse in November was not slight but serious, and of much longer duration than the evidence quoted would seem to show. We did not, as counsel claims, overlook the testimony not quoted. Counsel seems to misapprehend the purpose for which we quoted the testimony above referred to. We quoted it for the purpose of showing that the evidence would sustain findings and a judgment for plaintiff. The court below did not find as to the November sickness at all. The evidence would sustain a finding either way, that it was slight or that it was serious, and if appellant desired to make any point in this court on that sickness, he should have requested

further findings. Not having done so, the only point he could raise here was that the evidence would not sustain a decision and judgment for plaintiff at all, as to which we held against him.

The petition for a reargument is denied.

INSURANCE—BREACH OF WARRANTY OF OWNERSHIP.—A condition in an insurance policy as to the ownership of the property insured is to be understood, not in its technical sense, but as requiring that the insured shall be the actual and substantial owner: *Yost v. McKee*, 179 Pa. St. 381; 57 Am. St. Rep. 604, and note. For a construction of the provision in an insurance policy requiring "unconditional and sole ownership," see *Loventhal v. Home Ins. Co.*, 112 Ala. 108; 57 Am. St. Rep. 17, and note.

NEGOTIABLE INSTRUMENTS—POSSESSION AS EVIDENCE OF OWNERSHIP.—The possession of a note indorsed in blank is prima facie evidence of ownership, and, in the absence of rebutting evidence, entitles the plaintiff to recover thereon: *Berney v. Steiner Bros.*, 108 Ala. 111; 54 Am. St. Rep. 144, and note; *Perot v. Cooper*, 17 Colo. 80; 31 Am. St. Rep. 258, and note.

INSURANCE—CONSTRUCTION OF POLICY.—All conditions in an insurance policy involving forfeitures or exemptions are to be construed strictly against the insurer: *Duran v. Standard etc. Ins. Co.*, 63 Vt. 437; 25 Am. St. Rep. 773, and note; *Schürmann v. Dwelling House Ins. Co.*, 161 Ill. 437; 52 Am. St. Rep. 377, and note.

BREAULT v. ARCHAMBAULT.

[64 MINNESOTA, 420.]

LIENS—LOGGERS—WHO ENTITLED TO—COOKS.—A cook and his assistant, employed at a logging camp in cooking for the men engaged in cutting, hauling, and banking logs are entitled to a lien thereon under a statute providing that "any person who may do or perform any manual labor in cutting, banking, driving, rafting, cribbing, or towing any logs" shall have a preferred lien thereon as against the owner thereof and all other persons for the amount due for such services.

LIENS—LOGGERS—WHO ENTITLED TO.—A BLACK-SMITH employed at a logging camp in shoeing horses and in repairing sleds and tools, used by the men engaged in cutting, hauling, and banking logs, is entitled to a lien thereon under a statute providing that any person who may do or perform any manual labor in cutting or banking any logs shall have a preferred lien thereon as against the owner thereof, and all other persons for the amount due for such services.

LIENS—LOGGERS—LABOR BY TEAMS AND TEAMSTERS. One who furnishes teams and teamsters at a gross price per month employed in skidding, hauling, and banking logs is entitled to a lien under a statute providing that any person who may do or perform any manual labor in cutting, banking, driving, rafting, cribbing, or towing any logs shall have a preferred lien thereon as against the owner thereof and all other persons for the amount due for such services.

Draper, Davis & Hollister, for the appellants.

Teare & Middlecoff, for the respondents.

⁴²¹ COLLINS, J. These actions, brought to enforce log liens under the provisions of the General Statutes of 1894, sections 2451-2465, inclusive, against the same defendants, were argued and submitted together.

The complaint in the case in which Breault was plaintiff set forth three causes of action—the first being on account of services rendered by plaintiff himself, as a cook in the logging camp; the second, for services rendered at the same time and place by another person, as assistant cook or “cookie,” assigned to plaintiff; and the third, for services rendered by still another person, as a blacksmith, at the camp, and necessary for the performance of the work, such as shoeing the horses and repairing the sleds used in hauling the logs, and repairing the tools used by the men engaged in cutting the logs, also assigned to plaintiff.

The complaint in the Lane case alleged that plaintiff, at the request of Lane, and defendants Lane & Raymo, the contractors, furnished two teams of horses, and two teamsters to care for and drive the teams, at an agreed price per month for each team and teamster, for the purpose of skidding, hauling, and banking the logs.

The questions raised by a general demurrer to each complaint are whether, under the statute, a lien on the logs is given to a person who works as a cook, or as an assistant to the cook, in a lumbering camp, or a lien on the logs to the blacksmith who performs the work we have mentioned at such a camp, and also whether, under the same statute, a lien upon the logs is given to a person who, at the instance of those who contract to cut and bank the logs, furnishes a team and teamster, at a gross price per month for both, to skid, haul, and bank such logs, the person so furnishing not being personally engaged in the work himself.

That portion of the statute conferring the right of lien (Gen. Stats., sec. 2451) reads thus: “Any person who may do or perform any manual labor in cutting, banking, driving, rafting, cribbing, or towing any logs . . . shall have a lien thereon as against the owner thereof and all other persons . . . for the amount due for ⁴²² such services, and the same shall take precedence of all other claims thereon.”

It is the position of defendants (appellants) in the Breault case that the services rendered by plaintiff and his assigns in cooking and in blacksmithing do not come within the provisions

of the statute, because these services were not performed in cutting or banking the logs. The claim is for a strict construction of the statute, confining its application to those persons who actually and personally cut or bank, not extending its application to those whose services are as requisite and essential to properly accomplish the work to be done as are the services of the men who cut or bank the logs with their own hands. If this strict construction is to prevail, Breault's claim for liens cannot, in whole or in part.

That the statute in question was enacted to correct an abuse and to remedy an evil which had grown to enormous proportions is a matter of common history. Many owners of pine land habitually entered into logging contracts with reckless and irresponsible parties, the purpose and inevitable result being that the men who did the work were unable to collect their wages. The statute was passed to protect these men, and the interests of labor and a sound public policy require that it be liberally construed; that a construction be placed upon it which will protect all who, in furtherance of the common object, go into the logging camp, and there engage in the business of converting trees into logs and timber, in hauling the same to the banks of the streams, and there driving or rafting the product of their labor to market.

It is evident that a cook or a blacksmith is as essential to a logging crew as is the man who swings an ax or drives a team, and it is also evident that both perform manual labor. If the ax man or the teamster was compelled to leave his work, and spend two hours of each day in preparing his own food, or in shoeing his horses, or repairing his sled or tools, would it be suggested that his time while so engaged should be deducted from his day's work, and a lien allowed for the balance only? We believe that no one would think of asserting such a proposition. And, if this be so, why should a person who renders these services, but performs no other, be declared outside of the statute, and thus deprived of a lien? The camp cook and the blacksmith are part of the crew ⁴²³ whose business it is to cut and bank logs. They do not personally and directly engage in the work of cutting the logs or in handling them, but it is absolutely necessary that the men personally and directly engaged be furnished with food, that the animals be shod, that the sleds be kept repaired, and the tools be sharpened and kept in order. Nor do the men whose business it is to open up the logging roads, to keep them clear of snow and in good order for hauling, engage directly in cutting or hauling. But all of the men upon the

ground are engaged in a common enterprise—that of cutting and hauling logs. They are all employed at and about the logging camp, for the sole purpose of reducing the native trees to logs and timber, and in banking them upon the streams. They go into the woods for that purpose only, and, at the end of the season, they have done nothing else, although, for convenience and economy, they may have labored for the common end in different departments.

The policy of this court, when required to construe the log lien law, was announced in *Martin v. Wakefield*, 42 Minn. 176. It was there declared to be a remedial statute, to be liberally construed to advance the remedy. So construing it, we are of the opinion that such necessary persons in a logging crew as the camp cook, an assistant, if assistance be required, and a blacksmith, whose services are needed and performed in the manner alleged in the complaint, are entitled to the benefits of the log lien law. Nor are we without authority upon the right of a cook to enforce a lien under a similar statute: *Winslow v. Urquhart*, 39 Wis. 260.

As before stated, the plaintiff in the *Lane* case furnished, at the request of the contractors, two teams, and two teamsters to care for and drive the teams, at a gross price per month for each team and teamster. If plaintiff had driven these teams, the case would be covered by that of *Martin v. Wakefield*, 42 Minn. 176, in which it was held that, when a man and team were employed at a gross price for both, his lien on the logs extended to the use of the team. But the difference is, that plaintiff *Lane* performed no manual labor personally, all being done by the hired teamsters. But we cannot assent to defendants' contention that there is a marked distinction between the cases. Plaintiff was acting through her servants, and ⁴²⁴ the terms of the statute, under the application of the maxim, "He who acts through another acts himself," are logically applicable to one who provides teams with which to haul logs, and men to drive the teams, as did the plaintiff *Mrs. Lane*.

In determining her right to a lien, we are to remember that section 2464 provides that the log lien law is not to inure to the benefit of persons interested in contracting for the cutting or hauling of logs by the thousand: See *King v. Kelly*, 25 Minn. 522. It is declared that it is intended for the protection of laborers, and not for the benefit of contractors by the thousand. Although the language used is restrictive in form, it really explains and broadens section 2451, and furnishes an easy and prac-

licable test for most cases. The plaintiff Lane was not a contractor, within the meaning of section 2464.

We are of the opinion that, although she performed no manual labor in person, she did through her servants, and for their services and for the work done by her teams, is entitled to a lien. Should we hold otherwise, a person who had gone into the woods with a team under an agreement to haul would be deprived of a lien if disabled by an accident, and for that reason compelled to hire a substitute to handle the team. The language found in the statute should be construed as broadly as its common use will warrant, which would include such labor and services when performed by servants and agents, as well as personally, in a common count in assumpsit for work and labor: See *Hogan v. Cushing*, 49 Wis. 169, a case in which it was held that a plaintiff could maintain a log lien although the work was performed by his teams and servants. See, also, *Perry v. Duluth etc. Ry. Co.*, 56 Minn. 306, in which it was held that one who let his teams and teamster to a subcontractor to do work in constructing a railway was entitled to a lien under General Statutes, section 6231.

The order in each case is affirmed.

LIENS—STATUTORY—LOGGING.—Lien of laborers on lumber got out by them is restricted to the personal services of the claimant, and does not extend to expenses incurred in getting into the woods: *Spofford v. True*, 83 Me. 283; 54 Am. Dec. 621, and note. Under a statute creating such a lien, there is no lien for labor performed by their servants and teams: *Hale v. Brown*, 59 N. H. 551; 47 Am. Rep. 224. See *McCrillis v. Wilson*, 84 Me. 286; 56 Am. Dec. 655; *North Pac. Lumber Co. v. Lang*, 28 Or. 246; 52 Am. St. Rep. 780.

CHAMBERS v. NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY.

[64 MINNESOTA, 495.]

CONDITIONS PRECEDENT CALL for the performance of some act or the happening of some event after a contract is entered into and upon the performance or happening of which its obligations are made to depend.

INSURANCE—REPRESENTATIONS BY INSURED AS CONDITIONS PRECEDENT.—If an insured person contracts and warrants that if the representations made by him in his application for insurance are not true the policy shall be null and void, such representations are not conditions precedent but rather of the nature of a defeasance.

INSURANCE—LIFE—REPRESENTATIONS BY INSURED—BURDEN OF SHOWING FALSITY OF.—If a life insurance policy provides that the application for insurance shall be a part of the policy, and that if any false or fraudulent representation, statement, or warranty is made in such application the policy shall be null and void, the burden of proof is on the insurer to allege and show the falsity of such representations or statement, and he must allege specifically which of the representations he claims to be false, and he is limited in his proof to those so alleged.

INSURANCE—LIFE—REPRESENTATIONS BY INSURED—EVIDENCE.—If, under a life insurance policy providing that the application for insurance shall be a part of the policy, and that any false or fraudulent representation made therein shall render the policy null and void, the insurer alleges that a representation made by the insured that he has "always been temperate," was false evidence as to his business habits, pursuits, and associations, at and before the time of issuing the policy, is admissible as bearing upon the question whether he was temperate or intemperate.

INSURANCE—LIFE—MEANING OF "USE OF MALT OR SPIRITUOUS BEVERAGES" AND "TEMPERATE."—The question, "Do you use malt or spirituous beverages?" asked an applicant for life insurance, refers to a customary and habitual use, and not to a single or occasional act or use, and the question, "Have you always been temperate?" means moderation and an abstinence from excessive or injurious use, and not total abstinence from the use of malt or spirituous liquors.

Edmund S. Durment, for the appellee.

Clapp & McCartney, for the respondent.

406 **MITCHELL, J.** This was an action on a policy of insurance on the life of plaintiff's intestate.

The complaint alleged the issuing of the policy, the death of the insured, the furnishing of proofs of loss, and the refusal of the defendant to pay; also, generally, that the insured and the plaintiff had each fulfilled all the conditions of the policy. The policy, which was attached to the complaint, provided that the insured's application was made a part of the policy; also, that "if any fraudulent representation or statement shall be made in the application, . . . then and in every such case this policy shall be null and void." The application, which was introduced in evidence, contained numerous questions to the applicant and his answers thereto. All of these related to then existing or past facts. It also contained an agreement, signed by the applicant, that all the statements and answers written on the application, including those made to the medical examiner, are warranted to be true, and to be full and fair answers to the questions, without evasion or concealment, and are offered to the company as a consideration for the contract of insurance.

Defendant, in its answer, admitted the issuing of the policy, the death of the insured, the furnishing of proofs of death, and

a refusal on its part to pay, but, except as thus admitted, denied all the allegations of the complaint. It then alleged that the answers to the following questions in the application were false and untrue: "Have you ever had disease of the heart? A. No. Do you use malt or spirituous beverages? A. No. Have you always been temperate? A. Yes. Is there anything, or has there ever been anything, in your physical condition, family or personal history, or habits, tending to shorten your life, which is not distinctly set forth above? A. No." And that by reason of said false and fraudulent representations, and each of them, said policy or contract of insurance is null and void.

The assignments of error are very numerous, but most of them can be disposed of very briefly.

1. After a careful examination of the entire record, we are satisfied that there was no abuse of discretion on part of the trial court in refusing defendant's application for a continuance, for a postponement of the trial, for leave to amend its answer, or for a new trial on the ground of accident and surprise. To state fully our reasons for this ⁴⁹⁷ conclusion would require an extended review of the facts as disclosed by the record, which time and space will not permit, and which would be of no particular value as a precedent.

2. The next question is, Was the burden on the plaintiff to allege and prove the truth of the answers to the questions contained in the application, or was it upon the defendant to allege and prove their falsity? Defendant's contention is, that because, if any of these answers were false, the policy would be void ab initio, therefore they were conditions precedent, and hence, according to a familiar rule, the burden was on the plaintiff to allege and prove that they were true. The law is so well settled otherwise that it would hardly seem to require discussion.

For the purposes of this case, it is immaterial whether these answers are to be deemed warranties or mere representations, for the rule of pleading and proof would be the same in either case. Hence we shall assume, most favorably to the defendant, that the answers are warranties. A condition precedent, as known in the law, is one which is to be performed before the agreement of the parties becomes operative. A condition precedent calls for the performance of some act or the happening of some event after the contract is entered into, and upon the performance or happening of which its obligation is made to depend. In the case of a mere warranty, the contract takes effect and becomes operative immediately. It is true that, where a policy of insurance so

provides, if there is a breach of a warranty, the policy is void *ab initio*. But this does not change the warranty into a condition precedent, as understood in the law. It lacks the essential element of a condition precedent, in that it contains no stipulation that an event shall happen or an act shall be performed in the future, before the policy shall become effectual. It is more in the nature of a defeasance, where the insured contracts that, if the representations made by him are not true, the policy shall be defeated and avoided. But, even if these warranties are to be deemed conditions precedent, it has become settled in insurance law, for practical reasons, that the burden is on the insurer to plead and prove the breach of the warranties.

Not only so, but he must, in his pleading, single out the answers whose truth he proposes to contest, and show the facts on which his contention is founded. Otherwise, the insured would enter the trial ⁴⁹⁸ ignorant as to which of his numerous answers would be assailed as false. The number of questions in these applications is usually very great, relating to the habits and health of ancestors, the personal habits and condition of the applicant, etc., the truth of many of which it would be impossible to prove affirmatively after the death of the insured. To require such proof on part of the beneficiary would defeat more than half of the life policies ever issued. On the other hand, it is no hardship to require of the insurer, if he believes that any of these answers were false, that he specifically allege which ones he claims to be false, and produce evidence of the truth of his claim. It would be superfluous to cite authorities on this subject; but, to the point that these warranties are not conditions precedent, in the legal sense of the term, we refer to *Redman v. Aetna Ins. Co.*, 49 Wis. 431, and, for a forcible statement of the practical reasons for the rule, to *Piedmont etc. Life Ins. Co. v. Ewing*, 92 U. S. 377.

The dictum in *Price v. Phoenix etc. Ins. Co.*, 17 Minn. 473 (497), 10 Am. Rep. 166, that warranties are conditions precedent, the truth of which must be pleaded and proved by the assured was, we think, inadvertent, and cannot be adhered to. We therefore hold that it was no part of plaintiff's case to either allege or prove the truth of the answers in the application, that the burden of alleging and proving their falsity was on the defendant, that it was bound to specify in its defense the particular answers which it claimed were false, and that on the trial it was properly limited in its proof to those answers which it had specifically alleged to be false.

3. Upon the trial, the only substantial evidence produced by defendant tending to prove the falsity of any of the answers in the application related to those in response to the questions whether the applicant used malt or spirituous beverages, and whether he had always been temperate.

The only assignments of error not disposed of by what has been already said are those relating to the rulings of the court in the admission of evidence, and to its instructions to the jury upon the issue of the truth or falsity of the answers to these questions. The testimony of Dr. Clarke, referred to in the tenth assignment of error, does not seem to have been relevant to any issue in the case; but it was harmless, and its admission, if error, was without prejudice. The testimony of Durant, referred to in the eleventh, twelfth, and ~~also~~ thirteenth assignments of error, as to the business habits, pursuits, and associations of the insured, at and prior to the date of the application, had a legitimate and direct bearing upon the question whether he was temperate or intemperate. The defendant had very fully cross-examined the witness Welsh as to all facts within his knowledge as to the habits of the deceased, and there was no error in excluding the questions, referred to in the fifteenth and sixteenth assignments of error, as to whether the deceased looked as if he had been full or drinking, and whether the witness believed that he was sobering up, on a certain occasion previously testified to. The question (referred to in the sixteenth assignment of error) put to the plaintiff, when called in rebuttal, was properly excluded, as not being proper cross-examination.

The court instructed the jury that the question, "Do you use malt or spirituous beverages?" was to be construed as referring to a customary and habitual use, and not to a single or occasional act of use; also, that the word "temperate" was to be taken in its ordinary sense, and not as meaning total abstinence, and refused defendant's requests to instruct the jury that if the deceased, at the time he made the application for the insurance, used malt or spirituous beverages, even though only occasionally, and in small quantities, or if he used such beverages at all, or if, prior to the date of the application, he had drunk such beverages to excess even once, then plaintiff could not recover. But the court did instruct the jury that if, prior to the issuing of the policy, the deceased had been in the habit, periodically and frequently, of using spirituous and malt liquors to excess, or to such an extent as tended to shorten his life, then his answer to the last question was false; also, that before the plaintiff could recover,

and makes the mortgagor a party to such action, and where such mortgagor does not appear, but the mortgagee does appear, and files an answer in the office of the clerk of the district court, as provided in Gen. Stats. 1894, section 6238, relative to the enforcement of mechanic's liens, and in such answer prays for a foreclosure of the mortgage upon all of the premises described in the complaint; the mortgagor having no actual notice of the relief demanded in the complaint, and no constructive notice unless such filing so operates.

If the question was merely whether a mortgagee of the premises upon which the mechanic's lien is claimed can be made a party, for ⁵³⁵ the purpose of having the existence, date, and amount of his mortgage lien determined in the lien action, it would be concluded by the decision of this court in *Finlayson v. Crooks*, 47 Minn. 74. In the discussion of this question, it would be well to bear in mind the fact that the lien of mechanics and materialmen on buildings and the land upon which they are erected, as security for the value of services performed and materials furnished, is purely the "creation of statute." It was entirely unknown at common law or equity: *Phillips' Mechanics' Liens*, sec. 1. The rule of procedure for enforcement of mechanic's liens is to a great extent defined by the statute. The complaint is to be filed in the office of the clerk of the district court at the time of issuing the summons, which shall notify the defendant that the complaint has been filed, and that the action is for the foreclosure of a mechanic's lien. To this complaint the plaintiff must attach a bill of particulars of the items of the lien claim. All parties who have mechanic's liens filed of record upon the same property, or any part thereof, shall be made defendants. The complaint must require an adjudication and foreclosure of the amount and validity of the lien claim.

It may not be successfully asserted that, when these statutory proceedings to enforce the foreclosure of mechanic's liens have once been properly started in motion, any rules applicable to the usual course of law or equity cannot be invoked to aid in their successful final determination. But, because the court has judicial power to start the proceedings in motion, it does not necessarily follow that it has jurisdiction to draw into that proceeding a right to adjudicate upon the question of mortgage liens upon other separate and distinct pieces of land, not covered by the mechanic's lien claim, and especially not described in the complaint, nor embraced within the relief therein demanded. The owner of the premises may properly be made a party, in order

to have his interest in the premises adjudicated. But the plaintiff in such action has no right to bring in the owner of the premises, and invoke the jurisdiction of the court in respect to any other tract of land than the one affected by the mechanic's lien. When the complaint in this action was filed, and the Elmo Park Company served with notice to appear and answer, it related only to the forty-acre tract described in the complaint. The premises therein described were the subject matter concerning which the action ⁵³⁶ was brought, and upon which the plaintiff's lien claim was to be determined; and as to such matters, including other liens or rights in the particular forty acres described, the court acquired jurisdiction, because that was the subject matter for judicial decision, and regularly brought before the court.

What was the legal effect of the St. Paul Trust Company filing its answer in the office of the clerk of the district court, without serving it upon its codefendant, the assignor of plaintiff in this action, and without giving it any notice of the pendency of any such proceedings? It is quite obvious that the lienholder only claimed that a certain sum was due him for work and material, for which he claimed a lien upon the building and forty acres described in the complaint, and demanded the sale thereof to satisfy his demand; and that as between him and the mortgagee, whom he made a party to the suit, he claimed that his liens upon this particular forty acres were prior and superior to the lien of the mortgage. It did not concern the plaintiff whether there were other parcels of land covered by the mortgage, and he therefore tendered no issue in regard to outside premises. It is true, he made the Elmo Park Company a defendant, not, however, for the purpose of taking hold of property unaffected by his mechanic's lien, but because it was the owner of the specific piece of property directly affected by it. It did not, however, dispute the plaintiff's right of lien, or the right to enforce it against the premises described, for the amount claimed; and so far it had a right to rely upon the plaintiff's further proceeding according to the issue tendered in his complaint. The St. Paul Trust Company, also defendant, filed its answer, as above stated, not merely as to the plaintiff and the piece of property affected by the complaint, but demanded other and further relief against its codefendant.

The provisions of the mechanic's lien law for filing, instead of serving, pleadings, apply only to issues tendered by the complaint or expressly authorized by the statute, and not to plead-

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But jurisdiction of the courts over the person and subject matter is too essential to be disregarded, and, where either is wanting, it is a duty resting upon courts to fix the rights of the parties if they have the power to do ⁵³⁹ so. We have no criticism to make upon the doctrine, so often stated in the law book, that judgments of courts of general jurisdiction impart absolute verity, and that every presumption will be indulged in favor of the record. But, if there is an apparent defect in the jurisdictional record, it may be impeached collaterally; as, for instance, where a summons either shows a want of service or insufficient service, and the record does not show that the court had found that it had jurisdiction, the presumption will be overcome, and it will be held that the court acted upon the insufficient service, since the presumption must then be that it acted upon the service then appearing in the record: *Wells' Jurisdiction*, 27; *Clark v. Thompson*, 47 Ill. 25; 95 Am. Dec. 457. See, also, *Barber v. Morris*, 37 Minn. 194; 5 Am. St. Rep. 836.

Now, what is the record in this action as to the former foreclosure proceedings, wherein plaintiff herein is sought to be bound, and its right to attack such proceedings collaterally is denied? By stipulation of the respective parties, the trial court in this action found the following facts, which must be deemed true, and to which no objections are made, viz:

"That the answers of the defendant St. Paul Trust Company in each of the three mechanic's lien actions referred to in said findings and judgment were never served upon any of the other defendants in said three mechanic's lien actions, but that the same were filed in the clerk's office of this court, in each of said three actions, on the twenty-eighth day of October, 1891; that the defendant Elmo Park Company never appeared in the said three mechanic's lien actions, or took any part in the proceedings therein; nor did said Elmo Park Company appear or participate in the said proceedings had in the said three actions after the same were consolidated, in which the order of September 12, 1892, was entered, directing that the judgment in said consolidated action should stand and remain without modification or change, and that the real estate therein described should be sold as therein ordered."

The record was not one where, by reason of its mere silence, a conclusive presumption would arise as to the regularity of all proceedings necessary to confer jurisdiction upon the trial court, and therefore not impeachable collaterally. This finding forms the very groundwork for impeaching the judgment, within the

rules of law which we have already stated, viz., that plaintiff was entitled to notice of the crosscomplaint, and, in default thereof, was entitled to rely upon these principles of law, and not bound to take notice of any proceedings under such complaint. Hence the court was without ⁵⁴⁰ jurisdiction to render judgment upon the new subject matter embraced in the crosscomplaint, or against the plaintiff, the owner of the land, for a deficiency. The record in this case itself establishes the invalidity of the former decree and judgment, and therefore it is impeachable collaterally.

We have not overlooked the effect suggested by filing the *lis pendens*, and the fact that the plaintiff herein was, after the rendition of the judgment in the former action, cited to show cause why it should not be bound by it and the proceeding had thereon. The office of a *lis pendens* is merely to charge subsequent purchasers with notice of the pendency of the action. Neither can a void judgment be validated by citing the party against whom it is entered to show cause why it should not be declared valid.

Judgment reversed.

PLEADING—CROSS-BILL—PROCEDURE.—The object of a cross-bill for relief is to enable a defendant to avail himself of some defense which can only be made complete by granting him some relief against the complainant or against some codefendant. To be such it must be strictly confined to matters involved in the original cause; for if it introduces distinct matters it is an original bill, and the suits are separate and distinct: *Andrews v. Kibbee*, 12 Mich. 94; 83 Am. Dec. 766, and note. See, also, *Hurd v. Case*, 32 Ill. 45; 83 Am. Dec. 249, and extended note on the nature and objects of cross-bills: *Griffin v. Fries*, 23 Fla. 173; 11 Am. St. Rep. 351. An opportunity to answer a cross-bill must always be given: *Metcalf v. Hart*, 3 Wyo. 513; 31 Am. St. Rep. 122.

JUDGMENT—NOT RESPONSIVE TO ISSUES IN PLEADINGS. When a complaint tenders one cause of action, and in that suit service on, or appearance of the defendant is made, a subsequent judgment therein, rendered in the absence of the defendant, upon another and different cause of action than that stated in the complaint, is without binding force anywhere: Monographic note to *Falls v. Wright*, 29 Am. St. Rep. 84.

LIS PENDENS gives notice only of the facts contained in the record of the suit to which it relates as it was when the party effected the purchase, and only for the purposes of that suit, and for the benefit of the parties thereto: *Stout v. Philippi Mfg. etc. Co.*, 41 W. Va. 339; 56 Am. St. Rep. 843, and monographic note on the law of *lis pendens*.

JUDGMENTS—VOID—CANNOT BE VALIDATED.—A confessed judgment void because it does not comply with statutory requirements cannot be validated by renewal of execution: *Woods v. Bryan*, 41 S. C. 74; 44 Am. St. Rep. 688.

CASES
IN THE
SUPREME COURT
OF
MISSOURI.

COOKBILL v. HUTCHINSON.

[185 MISSOURI, 67.]

HUSBAND AND WIFE—SEPARATE ESTATE—MORTGAGE.—Recitals in a mortgage and the acknowledgment thereto executed by a married woman jointly with her husband, that the land mortgaged is her separate estate, does not make it such estate.

HUSBAND AND WIFE.—A MORTGAGE EXECUTED BY A MARRIED WOMAN jointly with her husband on land not her separate estate is valid and binding, although her note, the payment of which is secured by the mortgage, is void by reason of her coverture.

HUSBAND AND WIFE—MARRIED WOMAN'S DEED.—Recitals in a deed executed by a married woman do not create an estoppel against her or those claiming under her.

ESTOPPELS IN PAIS MUST BE SPECIALLY PLEADED to be available as a defense.

MORTGAGES—FORECLOSURE—RIGHTS OF LIFE TENANT AND REMAINDERMAN.—If a life tenant purchases the estate at mortgage foreclosure sale, the purchase is regarded as having been made for the benefit of the remainderman as well as himself, provided the remainderman pays his proportion of the purchase price within a reasonable time; but, if the latter is guilty of laches in this respect, the right must be denied him after a lapse of years and after the property has been improved and greatly increased in value.

J. W. Coburn and R. Hughes, for the appellants.

Kagy & Bremermann, for the respondents.

71 BURGESS, J. On the third day of June, 1872, Houston McFarland and Sue B. McFarland were husband and wife, living together as such at Weston, Platte county, Missouri. On that day she borrowed from one John E. McFarland the sum of four hundred and fifty dollars, for which she executed her personal note payable in three years from its date with interest at ten per

cent per annum. On the twenty-fifth day of June, 1872, Sue B. McFarland purchased from George G. Rounds the land in controversy, and received a deed therefor conveying to her the fee simple title thereto. On June 28, 1872, she mortgaged said property, her husband joining with her, to John E. McFarland to secure the payment of said note. By the mortgage power of sale was vested in the mortgagee, John E. McFarland.

There is recited on the face of the mortgage with respect to the land the following, to wit: "The same being the sole and separate estate of the said Sue B. McFarland." And in the certificate of acknowledgment the following, to wit: "And the said Sue B. McFarland, being by me first made acquainted with the contents of said instrument, upon an examination separate and apart from her said husband, acknowledged that she executed the same freely and without fear, ⁷² compulsion, or undue influence of her said husband, and desires to convey her separate estate therein."

There were born to Houston McFarland and wife two children only, Mary and Maggie, who were fourteen and sixteen years of age, respectively, in 1872. On March 8, 1877, Sue B. McFarland died, leaving her husband tenant by the curtesy and said daughters surviving her, her only heirs at law.

On June 13, 1878, John E. McFarland, the mortgagee in said mortgage deed, sold said property under the power of sale therein contained authorizing him to sell, at which sale Houston McFarland became the purchaser at the price of three hundred dollars, and on said day he received a deed for said land from said mortgagee. On September 6, 1879, Houston McFarland conveyed said land to Charles A. Hazen, who, on February 15, 1887, conveyed the land to the defendant, M. W. Hutchinson. Houston McFarland died June 8, 1888.

Maggie McFarland married Arthur G. Meads, and died prior to the institution of this suit without having issue born alive, leaving her sister, Mary F. Cockrill, who intermarried with C. B. Cockrill, her only heir at law.

When Hutchinson bought the property, he had no knowledge of any claim by plaintiffs thereto. It was then practically vacant, no improvements being on it except a house of but little value. Since then he has put lasting and valuable improvements thereon, of the aggregate value of about ten thousand dollars.

On the thirty-first day of December, 1892, plaintiffs instituted this suit to redeem from the sale under said mortgage, on the ground that the title acquired by Houston McFarland, by virtue

of his purchase and deed under said mortgage sale, was for the benefit of himself and his two daughters then living, he being tenant for life in possession, and his daughters remaindermen.

⁷³ The court below dismissed the bill, and rendered final judgment against plaintiffs in favor of defendants for costs. From the judgment plaintiffs appealed.

There is nothing in the deed from Rounds to Mrs. McFarland which can be construed as creating in her a separate estate to the land in question, nor is any such contention made by defendants. Nor could she, by any act of her own, or by any statement made in the mortgage, create a separate estate in the land in herself. The same is true with respect of the recital in the certificate of acknowledgment to the mortgage in which it is stated, "and she desires to convey her separate estate therein," that is, in the mortgage. Such recitals were inoperative to create a separate estate in her.

At the time she executed the note to John E. McFarland she did not own the land, nor does it appear that she owned any separate property; but notwithstanding such was the case, the subsequent acquirement by her by purchase of the land, the mortgage executed by her and her husband, Houston McFarland, thereon, to secure the payment of her debt, was a valid and binding mortgage. It has been repeatedly held by this court that a mortgage executed by a married woman, her husband joining with her, although on land not her separate estate, is valid and binding, notwithstanding the note, the payment of which is secured by the mortgage, is void because of her coverture: *Comings v. Leedy*, 114 Mo. 454; *Hagerman v. Sutton*, 91 Mo. 519; *Wilcox v. Todd*, 64 Mo. 388; *Meads v. Hutchinson*, 111 Mo. 620.

The effect of the sale under the mortgage, the purchase by Houston McFarland of the land at the sale, and the execution of the deed to him by the mortgagee, was to pass the legal title of the land to said McFarland, and the purchase by him must be deemed to have been ⁷⁴ made for the benefit of himself and the remaindermen, if the latter had seen fit to pay their share of the purchase money within a reasonable length of time thereafter.

Thus in 1 Washburn on Real Property, fifth edition, 129, it is said: "If a tenant for life purchase in an outstanding encumbrance upon an estate, it is regarded as having been done for the benefit of the reversioner as well as himself, if the latter will contribute his proportion of the sum paid therefor": *Allen v. De Groodt*, 105 Mo. 442; *Meads v. Hutchinson*, 111 Mo. 620; *Hinters v. Hinters*, 114 Mo. 26; *Dillinger v. Kelley*, 84 Mo. 561.

It follows from what has been said that the plaintiff, Mrs. Cockrill, has the right to redeem from the mortgagee's sale, unless she is estopped from so doing by reason of the recitals in the mortgage, and the certificate of acknowledgment heretofore quoted, or she has forfeited her right to redeem by reason of her own laches, or that she should not be permitted to do so against defendants, who claim to be innocent purchasers in good faith without any notice of her equity, if any she had. Of these in their order.

While it is conceded by defendants that, as a general rule, a married woman is not estopped by matters in pais, it is contended that this does not license her to commit a fraud to the injury of others, and that her acts and representations which do deceive others to their injury will preclude her from asserting her claim against those who have acted on her representations and admissions.

We have already said that Mrs. McFarland did not own a separate estate in the land in question. Therefore, she was not estopped, nor is plaintiff who claims under her estopped by the recitals in the mortgage from claiming the land. It has been held that recitals in a deed made by a married woman do not estop her or ⁷⁵ those claiming under her: *Crenshaw v. Creek*, 52 Mo. 98; *Hempstead v. Easton*, 33 Mo. 142. Moreover, estoppel is not pleaded in the answer, which is absolutely necessary when relied upon in pais as a defense: *Throckmorton v. Pence*, 121 Mo. 50, and authorities cited.

The legal title to the land passed to Houston McFarland by the mortgagee's deed of June 13, 1878 (*Meads v. Hutchinson*, 111 Mo. 620), at which time the cause of action of plaintiff and her sister Maggie accrued. One of them was then about twenty, and the other about twenty-two years of age, both of legal capacity to sue (*Gen. Stats. 1865, sec. 1, p. 466*), yet this suit was not instituted for about fourteen years thereafter, to wit, December 31, 1892. Since Hutchinson's purchase of the property he has greatly improved it, and its value has largely increased. Would it be equitable to allow plaintiff, who has for so long a time slept upon her rights, to now come in and redeem the property by paying a part, or even all, of the purchase money, with interest, paid for it by her father at the mortgagee's sale, and wrest it from defendants who purchased it, and have improved it, in good faith.

It is true that from August 1, 1881, to October 1892, there was an action pending for the possession of the land in which

plaintiff and her sister Maggie were plaintiffs, against these same defendants, but even that does not impress us with the justness of plaintiff's claim, or relieve it of the unfavorable impression that its staleness is calculated to create upon a court of equity.

In *Mandeville v. Solomon*, 39 Cal. 125, it is said: "Equity does not deny to a tenant in common the right to purchase in an outstanding or adverse claim to the common property; it, however, deals with the tenants after such a purchase is made. While it will not permit one of them to acquire such a title solely for his ⁷⁶ own benefit, or to the absolute exclusion of the other, it, at the same time, exacts of that other the exercise of reasonable diligence in making his election to participate in the benefit of the new acquisition; and having, upon its own principles of fair dealing, compelled the purchasing tenant to allow his cotenant this opportunity, the latter will not be permitted to equivocate or trifle with the position thus afforded him, or to make it a means of speculation for himself, by delaying, until the rise of the land, or some event yet in the future, shall determine his course. Unless he make his election to participate within a reasonable time, and contribute, or offer to contribute, his ratio of the consideration actually paid, he will be deemed to have repudiated the transaction and abandoned its benefits": See note to *Keech v. Sandford*, 1 White & Tudor's Lead. Cas. Eq. 70; *Lee v. Fox*, 6 Dana, 176; *Weaver v. Wible*, 25 Pa. St. 270; 64 Am. Dec. 696; *Lloyd v. Lynch*, 28 Pa. St. 419; 70 Am. Dec. 137.

The application of this just rule must be invoked in this case, and when this shall have been done is decisive thereof. After plaintiff has for so long slept upon her rights, without any manifestation of a desire to share the burdens of the purchase by her father at the mortgagee's sale, and thereby avail herself of its possible benefits, until the property has been improved and greatly enhanced in value, it would be inequitable to now permit her to do so.

We therefore affirm the judgment.

Gantt, P. J., and Sherwood, J., concur.

HUSBAND AND WIFE—SEPARATE ESTATE OF WIFE—WHEN CHARGEABLE WITH HER CONTRACTS.—The separate estate of a married woman is chargeable with her contracts and agreements only where there is proof of an express agreement or intention to create such charge: *Liton v. Baldwin*, 8 Humph. 209; 47 Am. Dec. 605; *Kantrowitz v. Prather*, 31 Ind. 92; 99 Am. Dec. 587, and extended note. Such intention may be implied from the fact that she executed

a note, bond, or other obligation for the indebtedness: Phillips v. Graves, 20 Ohio St. 371; 5 Am. Rep. 675. See monographic notes to Thomas v. Folwell, 30 Am. Dec. 233-241, and Trimble v. State, 57 Am. St. Rep. 169.

MARRIED WOMEN—CONVEYANCES—ESTOPPEL.—As to the application of the doctrine of estoppel to representations in conveyances of married women, see Trimble v. State, 145 Ind. 154; 57 Am. St. Rep. 163, and monographic note.

ESTOPPEL IN PAIS—PLEADING.—An estoppel in pais, constituting the basis of a right of action and ground of relief, or relied upon as a defense must be pleaded in equity cases, but need not be pleaded in actions at law: Dean v. Crall, 98 Mich. 591; 39 Am. St. Rep. 571. See monographic note to Tyler v. Hall, 27 Am. St. Rep. 344-349.

ESTATES—LIFE TENANT AND REMAINDERMAN—PURCHASE OF ADVERSE TITLE.—A tenant for life cannot deal to his advantage and to the disadvantage of remaindermen by buying in the lands under a trust deed made by a former owner, for the purpose of destroying their title and acquiring an independent title of his own. Such purchase will be regarded as made for the joint benefit of himself and them: Allen v. De Groodt, 98 Mo. 159; 14 Am. St. Rep. 626, and extended note; Whitney v. Salter, 36 Minn. 103; 1 Am. St. Rep. 656.

ROBERTSON v. STAED.

[185 MISSOURI, 125.]

RECEIVERS—FOREIGN—ACTIONS BY.—A receiver appointed by a court of the republic of Mexico, may, as against an attaching creditor of the debtor, who resides in one of the states of the United States, recover, by a suit in another state, the property of the debtor which has come into the possession of the receiver in the place of his appointment and which he has brought within the jurisdiction of the court where the action of replevin is brought.

RECEIVERS—FOREIGN—ACTIONS BY—BURDEN OF PROOF.—If a receiver claims a right to the possession of property in one jurisdiction solely, by virtue of the judgment of a foreign court, appointing him such receiver, the burden of proof is on him to show that that court had jurisdiction to confer such right upon him.

LAWS—FOREIGN—PROOF OF.—Foreign laws must be proved, and, if they are written, the laws themselves, or authenticated copies, must be produced, but, if they are not written, they may be proved by the evidence of witnesses who are competent to testify on the question.

JURISDICTION—FOREIGN COURTS—PROOF OF.—Proof of the fact that a foreign court uniformly exercises jurisdiction over a subject is prima facie sufficient to show jurisdiction.

W. C. and J. C. Jones and C. C. Kidd, for the appellant.

J. S. Laurie, for the respondent.

¹³⁷ MACFARLANE, J. This is an action of replevin to obtain the possession of a special railroad car known as the "Sierra Majado."

¹³⁸ The Monterey and Mexican Gulf Railroad Company is a corporation of the state of New York, which owned and operated

a railroad in the republic of Mexico. This corporation having become insolvent, its property was, by a decree of the federal district court for the state of Nuevo Leon, placed in the hands of plaintiff Robertson as receiver. Under and by authority of this decree the receiver was put into the possession of all the property of the corporation, including the car "Sierra Majado." This car was used by the managing officer of the corporation in traveling over the road and elsewhere on the business of the corporation. It was the private car of the executive officers of the company, and with the other property went into the possession of the receiver within the jurisdiction of the court.

In 1892 plaintiff brought the car from the republic of Mexico to St. Louis, where it was attached at the suit of Fairbanks, Morse & Co., creditors of said corporation, and citizens of the state of Illinois. Under a writ of attachment issued in that suit, which was against the corporation, the car in question was taken in possession by defendant, who is the sheriff of the city of St. Louis. This suit is by Robertson, as such receiver, to regain possession of the car.

1. The controlling controversy in this case is, whether a receiver, appointed by a court of the republic of Mexico, can, as against an attaching creditor of the debtor, who resides in the state of Illinois, recover, by a suit in a court of this state, the property of the debtor, which had come into possession of the receiver in Mexico, and which was brought into the jurisdiction of the Missouri court by the receiver himself.

The general rule is, that a receiver, appointed by a court of chancery, has no legal status outside the territorial jurisdiction of the court appointing him. He receives his powers from the court, and can only exercise ¹³⁹ them within its jurisdiction. The court itself has no power beyond the bounds of its jurisdiction, and can confer none upon the receiver. This strict rule of legal right is generally recognized: *Farmers' etc. Ins. Co. v. Needles*, 52 Mo. 17; *Booth v. Clark*, 17 How. 322; *Beach on Receivers*, sec. 680, and note for cases.

The rule, however, is not applied with the same strictness with which it is declared, but courts often, in the spirit of comity, recognize the rights and powers of receivers appointed in other jurisdictions, and allow them to sue for and recover property which they are entitled to hold under the order appointing them or to pursue generally their remedies. This spirit of comity has been so generally acted upon as to create an exception to the rule, almost as well established as the rule itself. In most courts

of the United States it is only withheld when to allow it would contravene the laws or public policy of the state, or would defeat or impair the rights of resident creditors: Beach on Receivers, sec. 682; Gluck & Becker on Receivers of Corporations, sec. 57, and cases cited in notes.

So far as I am advised, this court has never either recognized or denied this exception, nor do we deem it necessary to pass upon it in this case. The principle upon which we think this case must be ruled is one of law and not of comity.

The order of the federal court of Mexico required all the property of the railway corporation to be delivered into the hands of the receiver, who was directed to preserve and manage it for the benefit of all the creditors. Under this order the receiver obtained possession of the car in question within the jurisdiction of the court appointing him. The possession of the receiver was, therefore, lawful when taken. The car, with all other property of the corporation, was held for the benefit of foreign, as well as domestic, creditors. The creditors ¹⁴⁰ residing in the United States had no rights superior to those of the creditors residing within the jurisdiction of the court. It cannot be seen how those rights became paramount when the property was brought by the lawful possessor, within the jurisdiction of the courts of the United States. Courts will protect the rights of domestic creditors, and will not permit property located in their jurisdictions to be carried away by a receiver of a foreign state or nation, until all such creditors are satisfied. But we know of no principle upon which rights of domestic creditors can be created by reason of the property, in the lawful possession of the receiver, being brought within their jurisdiction. Such a rule would greatly embarrass the receiver in the discharge of his duties, and would, in many cases, affect injuriously the rights of creditors. Hence it is generally ruled that after a receiver has obtained possession of the property of the debtor within the jurisdiction of the court appointing him, such possession will be protected into whatever jurisdiction the property may thereafter be taken by the receiver.

The order of the court and the subsequent possession thereunder vested in the plaintiff a special property in the car which authorizes him to maintain this suit: *Cagill v. Wooldridge*, 8 Baxt. 580; 35 Am. Rep. 716; *Bank v. McLeod*, 38 Ohio St. 174; *Bagby v. Atlantic etc. R. R. Co.*, 86 Pa. St. 291; *Chicago etc. Ry. Co. v. Keokuk etc. Packet Co.*, 108 Ill. 317; 48 Am. Rep. 557; *McAlpin v. Jones*, 10 La. Ann. 552; *Pond v. Cooke*, 45 Conn. 126; 29 Am. Rep. 668.

Henry, J., in his dissenting opinion, in argument, states the rule thus: "A suit by the receiver to recover property of which he had obtained possession, but which has been taken from him, rests upon a different ground. In such a case, his former possession created a special property which will support the action": *State v. Gamba*, 68 Mo. 296. This declaration, while probably not necessary to a decision of the question in ¹⁴¹ issue, was not inconsistent with what was said by the majority of the court, and, at least, expresses the views of the learned writer.

The rule is thus expressed by recent text-writers: "So long as the property is taken from the corporation and placed in the hands of the receiver, with full power, under the direction of the court, to settle the estate of the corporation, it cannot be taken from the receiver by a creditor of the corporation, but will be treated in another state precisely as it would have been by the courts of the state where the receiver was appointed, if the controversy had arisen there": *Gluck & Becker on Receivers of Corporations*, sec. 57, p. 183.

In *Chicago etc. Ry. Co. v. Keokuk etc. Packet Co.*, 108 Ill. 317, 48 Am. Rep. 557, the controlling facts were similar to the facts in this case. The property of the packet company had been put into the hands of a receiver under an order of a court in the state of Missouri. The property, including a certain barge, came into the hands of the receiver. In conducting the business of the company, the receiver sent the barge to Quincy, in the state of Illinois, where it was taken by the sheriff under attachment by an Illinois creditor of the packet company. The receiver interpleaded, claiming the property under the order of court and his possession thereunder. The court held that the suit could be maintained.

Upon this state of facts the court stated the law as follows: "By taking the barge into his possession within the jurisdiction of the court that appointed him, a special property in the barge became vested in the receiver, and it is the established rule that where a legal title to personal property has once passed and become vested in accordance with the law of the state where it is situated, the validity of such title will be recognized everywhere."

In *Pond v. Cooke*, 45 Conn. 126, 29 Am. Rep. 668, a receiver appointed in ¹⁴² New Jersey transported iron to the state of Connecticut to be used in completing a contract of the debtor made prior to the appointment of the receiver. The property was taken under attachment by a creditor of the state of Connecticut. The property was claimed by the receiver. The court,

in deciding the controversy, says: "Thus it appears that the property was in the possession of the defendant as receiver when it came into this state. He was invested with it, and was legitimately performing the duties of his appointment in completing the contract by its use when it was attached by the plaintiff. In these circumstances, comity among the states requires that the case should be regarded by our courts precisely as it would have been by the courts of New Jersey if the controversy had arisen there."

The court says further: "When property has once vested in a trustee, assignee, or receiver, by the law of the state where the property is situated, it makes no difference whether it is done under the local law of the state or under the common law. The law of another state will not divest the trustee, assignee, or receiver of his right to the property, should he take it into such state in the performance of his duty."

In *Brownell v. Manchester*, 1 Pick. 233, it was held that a sheriff in the state of Massachusetts, who had attached property in that state, did not lose his special property by removing the attached property into the state of Rhode Island for a lawful purpose.

An administrator who has obtained a judgment in his representative capacity in the domestic court has been allowed to maintain an action in his own name, on the judgment in a foreign court, on the ground that the title to the judgment was vested in him: *Lewis v. Adams*, 70 Cal. 403; 59 Am. Rep. 423; *Barton v. Higgins*, 41 Md. 539; *Cherry v. Speight*, 28 Tex. 503; *Rucks v. Taylor*, 49 Miss. 552.

¹⁴³ Our opinion is, that the order of the court, and the subsequent possession thereunder in Mexico, vested in the plaintiff a special property in the car, and authorized him to maintain this suit for the recovery of the property even against the claim of creditors of the United States.

2. The pleadings put in issue the jurisdiction of the court appointing the receiver.

The only proof of the jurisdiction was the evidence of witnesses who had knowledge of the laws of Mexico, and of the proceedings of the courts of that country. This evidence showed that the district courts of Mexico uniformly exercised jurisdiction in the appointment of receivers, and in controlling the affairs of insolvent corporations until the property could be sold and applied to the payment of the debts. It was not shown whether or not the jurisdiction of these courts was defined by statute or was

fixed by long continued exercise of it. The record of the proceedings appointing plaintiff receiver of the Monterey & Mexican Gulf Railway Company discloses the fact that the appointment grew out of attachment proceedings against the corporation, and the nomination of creditors as provided by the commercial code of Mexico. It also appears on the face of the record that the duty of receivers and their powers are matters of statutory regulation. It is insisted by defendant that, as the record shows that the court is governed by statute law, the jurisdiction of the court to appoint plaintiff receiver could only be established by the statute itself.

As plaintiff claims a right to the possession of the property solely by virtue of the judgment of a foreign court, it was incumbent on him to prove that the court had jurisdiction to confer the right upon him. The property belonged to the corporation for whose debt the car in question was attached. The attachment is ¹⁴⁴ valid, and the right of defendant, as sheriff, to hold the property is complete, unless plaintiff has shown a valid transfer, not only of the possession, but the right of possession, to himself prior to the attachment. If the court had no jurisdiction to make the appointment, the judgment conferred no right upon the receiver.

Greenleaf says: "In order to found a proper ground of recognition of a foreign judgment, . . . it is indispensable to establish that the court which pronounced it had a lawful jurisdiction over the cause": 1 Greenleaf on Evidence, sec. 540; Taylor v. Columbian Ins. Co., 14 Allen, 357. See, also, Kronberg v. Elder, 18 Kan. 150, in which it is held by Brewer, J., that one claiming a right, as receiver, must show that the court had jurisdiction to confer the right.

What the laws of foreign countries are, when made an issue in a case, must be proved as other facts. If they are written, the laws themselves, or authenticated copies, must be produced; if they are not written, then they may be proved by the evidence of witnesses who are competent to testify on the question: Charlotte v. Chouteau, 25 Mo. 465; 1 Greenleaf on Evidence, secs. 486-488; Pierce v. Indseth, 106 U. S. 551.

If the jurisdiction of the district courts of Mexico is not defined by statute, we are of the opinion that the evidence offered by plaintiff makes, prima facie, sufficient proof of it to authorize the judgment. The fact that a foreign court uniformly exercises jurisdiction over a subject, in the absence of proof to the contrary, ought to be taken as evidence of the jurisdiction. That

is about the only proof of which the fact is susceptible, except probably the written or published decisions of the court itself, if such should be in existence, of which there is no proof in this case.

But the defendant insists that the record of the judgment and decree of the court appointing and confirming ¹⁴⁵ plaintiff as receiver shows upon its face that the court is governed by statute laws, and therefore the laws themselves should have been produced.

A careful examination will show that the reference to a code and to the commercial law applies to the matter of procedure in court rather than the jurisdiction of the court. We are not concerned in this collateral proceeding about how the receiver was appointed or what his duties are under the statutes of Mexico. If the court had jurisdiction to appoint him, the judgment itself affords at least presumptive evidence that the proper steps were taken: *Greenleaf on Evidence*, sec. 541; *Palton v. Platner*, 13 Ohio, 217; 42 Am. Dec. 197.

The judgment is affirmed.

Robinson, J., concurs.

Barclay, J., concurs in conclusion.

Brace, P. J., absent.

RECEIVERS—FOREIGN—ACTIONS BY.—As a general rule, the powers and functions of a receiver for the purposes of litigation are limited to the courts of the state within which he was appointed, but in a variety of instances this rule has been relaxed upon the principle of comity between courts: *Monographic notes to Straughan v. Hallwood*, 8 Am. St. Rep. 49-54, and *Alley v. Caspari*, 6 Am. St. Rep. 185-189. See, also, *Holbrook v. Ford*, 153 Ill. 633; 46 Am. St. Rep. 917, and note.

EVIDENCE—FOREIGN LAWS—PROOF OF.—A foreign law is a matter of fact which the courts of this country cannot be presumed to be acquainted with, or to have judicial knowledge of. Therefore it must be pleaded and proved: *Wickersham v. Johnston*, 104 Cal. 407; 43 Am. St. Rep. 118, and note. In proof of such laws the testimony of any person, whether a professed lawyer or not, who appears to be well informed on this point, is competent: *Hall v. Costello*, 48 N. H. 176; 2 Am. Rep. 207; *Barrows v. Downs*, 9 R. I. 448; 11 Am. Rep. 283.

JURISDICTION OF FOREIGN COURT is not presumed but must be proven: *Coit v. Haven*, 80 Conn. 190; 79 Am. Dec. 244, and note. See extended note to *Lazier v. Westcott*, 82 Am. Dec. 412.

EX PARTE SMITH.

[135 MISSOURI, 223.]

CONSTITUTIONAL LAW—ORDINANCES—PERSONAL LIBERTY.—A municipal ordinance making it a crime for "anyone knowingly to associate with persons having the reputation of being thieves, burglars, pickpockets, pigeon droppers, bawds, prostitutes, or gamblers, or any other person, for the purpose or with the intent to agree, conspire, combine, or confederate to commit any offense, or to cheat or defraud any person of any money or property," is unconstitutional as being an invasion of the rights of personal liberty.

CRIMINAL LAW.—GUILTY INTENTION, UNCONNECTED with an overt act or outward manifestation, cannot be the subject of punishment under statute.

HABEAS CORPUS TO TEST CONSTITUTIONALITY OF LAWS.—The supreme court of a state may interfere by means of the writ of habeas corpus, to investigate the constitutionality of a statute or ordinance on which a judgment resulting in the imprisonment of a petitioner is founded; and, if such law is found to be invalid and unconstitutional, the petitioner is entitled to be discharged.

G. B. Sidener, for the petitioner.

W. C. Marshall, for the respondent.

225 SHERWOOD, J. The petitioner is confined in the workhouse of the city of St. Louis, and in his petition sets forth such grounds as make a prima facie case, and accompanies the petition with a copy of the original complaint and order of commitment.

It appears from the return made to our writ of habeas corpus by Nicholas Karr, superintendent of the workhouse, that he holds petitioner by virtue of two executions issued and delivered to the marshal of the city of St. Louis on the twenty-ninth day of April, 1896, by the clerk of the first district police court; one of said executions being for the sum of ten dollars, with three dollars costs, and the other for the sum of five hundred dollars with three dollars costs, and copies of said executions were subsequently delivered on the same day by the marshal to the superintendent of the workhouse, which said executions were based on two judgments rendered against petitioner for infractions of certain ordinances of the city of St. Louis.

The execution for the smaller sum need not be discussed, since the validity of the ordinance on which it is grounded stands unquestioned. But it is necessary just here, however, to say that under the ordinances of the city of St. Louis, a prisoner committed to the workhouse is allowed to work out his fine and costs at fifty cents per day, and is charged meanwhile thirty cents per day for his board: Revised Ordinances, 1887, c. 47, ²²⁶ secs. 1760,

1772. So that petitioner's time under the smaller execution will last sixty-five days, and will expire on July 3, 1896.

The status of petitioner under his imprisonment based on the larger execution is now to be considered. That execution issued on a judgment of the first district police court, rendered on a complaint or report made and preferred by L. Harrigan, chief of police, which complaint is founded on the eighth clause of section 1033, article 6, chapter 25, of the Revised Ordinances of 1887, which is the same as the like clause in section 1062 of the Revised Ordinances of 1892, article 6, chapter 26, page 889. This eighth clause is a part of what is known as the ordinance respecting vagrants, and it forbids anyone knowingly to associate with persons having the reputation of being thieves, burglars, pickpockets, pigeon droppers, bawds, prostitutes, or lewd women, or gamblers,* or any other person, for the purpose or with the intent to agree, conspire, combine, or confederate: 1. To commit any offense; or 2. To cheat or defraud any person of any money or property, etc.

This ordinance is now attacked on the ground of its unconstitutionality in that it invades the right of personal liberty by assuming to forbid that any person should knowingly associate with those who have the reputation of being thieves, etc. And certainly it stands to reason that if the legislature, either state or municipal, may forbid one to associate with certain classes of persons of unsavory or malodorous reputations, by the same token it may dictate who the associates of anyone may be. But if the legislature may dictate who our associates may be, then what becomes of the constitutional protection to personal liberty, which Blackstone says "consists in the power of locomotion, of changing situation, or moving one's person ²²⁷ to whatsoever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law"? 1 Blackstone's Commentaries, 134. Obviously, there is no difference in point of legal principle between a legislative or municipal act which forbids certain associations and one which commands certain associations. We deny the power of any legislative body in this country to choose for our citizens whom their associates shall be.

And as to that portion of the eighth clause which uses the words, "for the purpose or with the intent to agree, conspire, combine, or confederate, first to commit any offense," etc., it is quite enough to say that human laws and human agencies have not yet arrived at such a degree of perfection as to be able without

some overt act done, to discern and to determine by what intent or purpose the human heart is actuated. So that did we concede the validity of the former portion of the eighth clause, which we do not, still it would be wholly impracticable for human laws to punish or even to forbid improper intentions or purposes. For with mere guilty intention, unconnected with overt act or outward manifestation, the law has no concern: *Howell v. Stewart*, 54 Mo. 404.

In *St. Louis v. Fitz*, 53 Mo. 582, the ordinance in question, then known as the ninth clause (Revised Ordinances 1871, c. 20, art. 4, sec. 1), was like the present one down to the * just after the word "gamblers," but did not contain the words "for the purpose or with the intent to agree," etc. But in that case, however, the ordinance was so amended by judicial construction, as to be held valid, and afterward the common council, acting upon that hint, conformed the ordinance to such construction so as to supply the words therein indicated, to wit, "for the purpose or with the intent to agree, conspire," etc.

²²⁸ But notwithstanding such emendations and additions as aforesaid, this court, in the quite recent case of *St. Louis v. Roche*, 128 Mo. 541, held the eighth clause, in so far as heretofore quoted, invalid on the distinct ground that it invaded the constitutional right of personal liberty, and *St. Louis v. Fitz*, 53 Mo. 582, was overruled.

It has been urged that we cannot, in habeas corpus proceedings, investigate and question the constitutionality of an act upon whose provisions a person has been tried and convicted; but we think otherwise. In *Ex parte Siebold*, 100 U. S. 371, it is well said that "an unconstitutional law is void, and is as no law. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment." Formerly, the courts were disinclined to look into the constitutionality of a statute in habeas corpus proceedings to determine whether a person was lawfully convicted, but since the decision already quoted from, the state courts have fallen into the now prevalent practice of entertaining jurisdiction of such proceedings for the purpose mentioned: *Church on Habeas Corpus*, 2d ed., sec. 83, and cases cited in note 2, secs. 245 a, 325, 349, 351, 352, and cases cited.

In *Ex parte Boenninghausen*, 91 Mo. 301, it was indeed ruled that the constitutionality of an ordinance, where a person has been convicted thereunder, will not be tested by habeas corpus

proceedings. But in that case an earlier one in the same volume was overlooked in which, on habeas corpus proceedings, a party attached for contempt was discharged on the ground that the statute under which he acted was constitutional: *Ex parte Marmaduke*, 91 Mo. 228; 60 Am. Rep. 250.

In *Ex parte Swann*, 96 Mo. 44, the constitutionality of the local option law was tested after conviction and judgment by habeas corpus, and the petitioner remanded.

²²⁹ So, too, in a much later case, a negro had been arrested and adjudged a vagrant under the provisions of sections 8846, 8848, and 8849 of the Revised Statutes of 1889, and on application to this court he was discharged on habeas corpus, because of the statute being held unconstitutional: *In re Thompson*, 117 Mo. 83; 38 Am. St. Rep. 639.

So that it may now be regarded as the established doctrine of this court that it will interfere by means of the writ of habeas corpus to look into and investigate the constitutionality of a statute or ordinance on which a judgment which results in the imprisonment of a petitioner is founded.

And if it be true, as must be true, that an unconstitutional law is no law, then its constitutionality is open to attack at any stage of the proceedings and even after conviction and judgment; and this upon the ground that no crime is shown and therefore the trial court had no jurisdiction; because its criminal jurisdiction extends only to such matters as the law declares to be criminal, and if there is no law making such declaration, or, what is tantamount thereto, if that law is unconstitutional, then the court which tries a party for such an assumed offense, transcends its jurisdiction and he is consequently entitled to his discharge, just the same as if the nonjurisdiction of such court should, in any other manner, be made apparent.

Under the sentence imposed of a fine of ten dollars and three dollars costs on petitioner he will have to remain in the workhouse for sixty-five days, which will expire on July 3, 1896.

Under the sentence imposed by the five hundred dollars fine and the three dollars cost, petitioner would have had to remain in the workhouse for two thousand five hundred and fifteen days, or six years, ten months, and twenty-five days, a longer period than he would have to remain in the penitentiary for the commission of many felonies.

²³⁰ Inasmuch, however, as we hold that sentence invalid because of the unconstitutionality of the ordinance heretofore quot-

ed, we order that, on expiration of the time required to satisfy the ten dollars' fine and costs, petitioner be discharged from the workhouse.

All concur.

CONSTITUTIONAL LAW—PERSONAL LIBERTY.—The constitutional guaranty of personal liberty has been interpreted in the following cases: *People v. Gillson*, 109 N. Y. 389; 4 Am. St. Rep. 465; *People v. Armstrong*, 73 Mich. 288; 16 Am. St. Rep. 578; *Pinkerton v. Verberg*, 78 Mich. 573; 18 Am. St. Rep. 473; *Millikin v. City Council*, 54 Tex. 388; 38 Am. Rep. 629.

HABEAS CORPUS—CONSTITUTIONALITY OF STATUTE.—If a prisoner claims that the statute under which he was convicted was unconstitutional, and therefore void, that question may be considered and determined upon habeas corpus: *In re Wright*, 3 Wyo. 478; 31 Am. St. Rep. 94; *Ex parte Rosenblatt*, 19 Nev. 439; 3 Am. St. Rep. 901. See extended note to *Morrill v. Morrill*, 23 Am. St. Rep. 109-111.

SPILLANE v. MISSOURI PACIFIC RAILWAY COMPANY.

[185 MISSOURI, 414.]

NEGLIGENCE—EVIDENCE.—In an action to recover for an injury received several hundred feet from a railroad crossing, a municipal ordinance requiring a railroad company to station a watchman at crossings to protect persons about to cross is not admissible in evidence to show negligence on the part of the railroad company.

NEGLIGENCE—DEGREE OF CARE REQUIRED OF INFANT.—While it is not presumed that a boy nine years of age is capable of exercising that degree of prudence exacted of an adult, yet he must exercise such degree of care as is commensurate with the intelligence, capacity, and experience which he is shown to possess.

NEGLIGENCE—CARE REQUIRED OF INFANT—DUTY TO LOOK AND LISTEN.—If it is shown that an infant is old enough to know the danger of going upon railroad tracks, and that he is intelligent and conversant with the management of trains thereon, he must look and listen for trains, and seek to avoid danger by getting off the tracks, and his failure to do so is contributory negligence.

NEGLIGENCE OF INFANT.—If the proof shows that an intelligent boy, nine years of age, familiar with the locality and the movements of trains, is injured while standing near a railroad track as a train passes, having one end of a string tied to his wrist and the other to a piece of ice on the opposite side of the track, and that the injury is caused by the locomotive striking the string and throwing the boy against the train, he is guilty of contributory negligence, and cannot recover for his injury so received.

NEGLIGENCE.—PLAINTIFF'S CONTEMPORANEOUS CONTRIBUTING NEGLIGENCE. directly contributing to his injury, is a complete defense to his action to recover therefor.

R. H. Hamilton, R. E. Ball, and Fyke, Yates & Fyke, for the appellants.

Robinson & Carkener, for the respondent.

⁴¹⁷ GANTT, P. J. This is an action for damages resulting from personal injuries sustained by plaintiff on the 13th of October, 1888. This is the second appeal in the cause. The first is reported in 111 Mo. 559. On the last trial the jury returned a verdict for defendant, from which plaintiff brings error.

The accident occurred at a point on defendant's railway in Kansas City two hundred and sixty-five feet east of the east line of Grand avenue where said avenue intersects defendant's tracks on Front street. At this point and for several hundred feet both east and west the defendant's railway is located on and along Front street in said city. Grand avenue runs north and south and the railway east and west. Across Grand avenue and at the point where the accident occurred, the defendants' railway consists of four parallel tracks.

Beginning at the south the first track is known as the outgoing or east bound main track, the second as the incoming or west bound track; the other two are team or storage tracks used in loading or unloading freight. East of Grand avenue the tracks are straight, but three hundred or four hundred feet west of Grand avenue there is a curve so that a person coming from the west along the railroad track could not see beyond Grand avenue until after having passed this curve, nor ⁴¹⁸ could a person on the track east of Grand avenue see a train coming from the west until after it rounded this curve.

Coming from the west there is a considerable upgrade until near Grand avenue, and from that point east the track is practically level. The defendant's freight depot is located on the north side of the tracks and on the west side of Grand avenue and about fifty feet from the west line of said street, and its passenger depot is located on the south side of the tracks and east side of Grand avenue. The platform of this depot extends from the east line of Grand avenue eastwardly from one hundred to two hundred feet, as variously estimated by the witnesses.

Wood Brothers' icehouse is located on the north side of the tracks and something over three hundred feet east of Grand avenue. The two main tracks are located on Front street, while the two team tracks on the north are located on private property just north of the north line of said street. The tracks are only a few feet apart, and the spaces between the rails are planked over for the accommodation of passengers getting on and off trains and of persons desiring to load and unload freight.

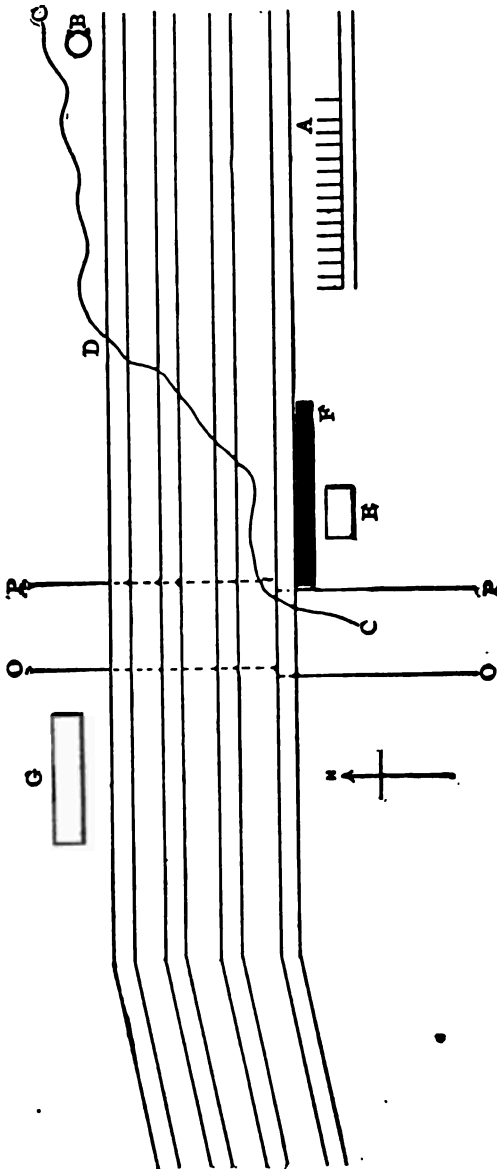
Teamsters and other persons having occasion to go to Wood Brothers' icehouse were accustomed to travel north on Grand

avenue until reaching the railway tracks, and thence diagonally across the tracks to a wagon road on the north side of the tracks leading to said icehouse. This road leaves the railroad tracks at a point one hundred and fifty feet east of the east line of Grand avenue and one hundred and six feet west of the point where the plaintiff received his injuries.

The plat accompanying this opinion accurately describes the situation of the various points referred to in the testimony of the witnesses.

420 The plaintiff's father resided with his family, on Grand avenue, about a block and a half south of defendant's tracks. He had lived there about two years prior to the date of the accident, and had lived in the neighborhood of the place where the accident occurred for several years prior to that time. During all this time the plaintiff had been accustomed to playing about the railroad tracks, and was perfectly familiar with everything in the locality and of the movement of the trains. According to plaintiff's own testimony, as well as that of his father and mother, and several neighbors who were intimately acquainted with him, he was a very bright, intelligent boy, and perfectly aware of the danger of being on or about the railroad tracks while trains were passing. At the time of the accident the plaintiff was something over nine years old. A month prior to the accident his mother had given to Miss Halbert, a teacher in the school to which plaintiff was sent, a statement that he was then nine years and three months old. During the summer vacation preceding the accident he had been engaged in selling papers around the city, and had continued this in the evenings after the session of school began. His mother had been accustomed to send him to Wood Brothers for ice. In the afternoon of the day of the accident he was sent by his mother to Wood Brothers for a piece of ice. He took with him a twine string, and tied one end of it to the ice, and the other end to his wrist, for the purpose of dragging the ice home, instead of carrying it. He was accompanied by his brother, a boy about seven years old. So far as the evidence shows, no person saw him from the time he left the icehouse until after the accident had occurred.

A switch engine, hauling about forty cars, passed eastwardly on the south track, and just after it passed the plaintiff was discovered lying on the south side of 421 this track at a point two hundred and sixty-six feet east of the east line of Grand avenue. He had received a very severe scalp wound, and the ends of two of the fingers of the left hand were mashed. None of the train-



men saw the plaintiff at the time of the accident. The engineer and fireman were at their proper places in the cab and looking forward, but neither they nor any of the other trainmen knew of the accident until several hours after it had occurred. They were taking the cars to different places in the bottoms east of Kansas City, and did not return until late in the afternoon. When they returned they were informed by Mr. Hennesy, the defendant's freight agent at Grand avenue, of the accident.

The petition charged negligence: 1. In the failure to have a watchman present at the Grand avenue crossing of defendant's tracks, as required by sections 816 and 819 of chapter 42 of the ordinances of said city; and 2. In running said train in excess of six miles an hour in violation of the ordinances of said city.

Section 816 provides that "one or more watchmen shall be employed at the expense of the person or corporation using railroad tracks or operating railroads within this city, to be stationed at each of the crossings hereinafter named, whose duty it shall be by day and night to notify all persons about to cross the railroad track at any such crossing of the approach of any locomotive, tender, or car.

Section 819 designates as one of such crossings the crossing by the railroad tracks over Grand avenue at Front street.

Section 820 imposed a penalty of not less than twenty-five dollars nor more than five hundred dollars upon any conductor, engineer, fireman, brakeman, or other person who should move, or cause, or allow to be moved, any locomotive within the city limits at a greater speed than six miles per ⁴²² hour. The circuit court excluded sections 816 and 819 of the ordinances upon objections of defendant.

The testimony was very conflicting as to the rate of speed of the train, plaintiff's witnesses placing it at twenty-five to thirty-five miles an hour, and defendant's at not exceeding six or perhaps ten. Other facts necessary to an understanding of the case will be stated in the opinion.

The errors assigned are: 1. The court erred in excluding section 816 of the ordinances set out in plaintiff's petition; 2. The court erred in giving defendant's instruction number 3; 3. The court erred in giving defendant's instruction number 5; 4. The court erred in giving defendant's instruction number 7.

1. The circuit court did not err in excluding section 816 of the ordinances. It was irrelevant to the case. That ordinance had in view the protection of persons "about to cross the railroad track at the designated crossings." As all the evidence showed,

the plaintiff was not hurt at the crossing and was not about to cross the tracks at a point where a watchman had been deemed necessary by the city council, but was hurt two hundred and sixty-six feet east of said Grand avenue crossing, the failure to have a watchman at that crossing did not contribute in any degree to plaintiff's injury, and had no causal connection therewith. Plaintiff entirely failed to bring himself within the protection afforded by the ordinance.

2. The second assignment challenges the correctness of the defendant's third instruction.

That instruction is in these words: "The jury are instructed that the defendant railroad company had a right to run its locomotives and ⁴²³ train of cars along and across the street where the plaintiff received his injury, at the time the accident occurred, and that it was the duty of the plaintiff to use his eyes and ears when attempting to cross the tracks of defendant to ascertain if there was a train approaching, before he entered upon the track of defendant; and if the jury find that the plaintiff could have seen or heard the approaching train by the use of his eyes and ears, or by the exercise of ordinary care and diligence on his part could have seen or heard the train approaching in time to have avoided the injury, then you should find for the defendant, although you may further believe from the evidence that the train and locomotive were running at a rate of speed exceeding six miles an hour; and the degree of care and diligence the law required him to exercise at the time of the accident was such care and diligence as might reasonably be expected of one of his age, intelligence, capacity, and experience."

It is insisted that it is contradictory in itself; that in one breath it informs the jury that it was his absolute duty to look and listen for the train, and in another that it was not his duty to do so unless the jury found that a boy of his age, intelligence, and experience would reasonably have done so.

The instruction is open to criticism. It is unhappily drawn, and yet, when all its parts are read together and the whole read in connection with plaintiff's third instruction, which told the jury that "plaintiff was only required in crossing said railway to exercise that degree of care which, under like circumstances, could reasonably have been expected of a boy of his years and experience, and that if he did exercise such care as, under like circumstances, could have been expected of a boy of his years, capacity, and experience he was not guilty of contributory negligence," we think it can ⁴²⁴ hardly be said to have misled

the jury as to the measure of plaintiff's responsibility for the exercise of care in going upon the track. The instruction is by no means a model, and is not to be followed as a precedent.

The judgment of the circuit court ought not to be reversed on account of error in this instruction, because it is obvious he was not on the track when struck. The physical facts, and plaintiff's own evidence, and his statements to Dr. Iuen soon after he was hurt, all tend to show beyond cavil that he was outside of the track when he was hurt. He testified on the first trial that he had the rope or string dragging the piece of ice, and the engine came along and caught the rope, and he could not let go and it threw him down. To Dr. Iuen he said the ice was on one side of the track and he was on the other, and the accident was caused by the engine catching the string and jerking him down.

His mother testified he had the string tied around his wrist when they brought him home after he was hurt. In view of all this evidence it is obvious that the issue tendered as to crossing the tracks was really outside of the case made.

But there is another and potent reason why this instruction should not cause a reversal. This boy was shown to be conversant with the running of trains at this place. He lived very close to the depot, and frequently played about the tracks. It was shown he was an exceedingly bright and intelligent boy. When his mother was asked "if he was old enough and smart enough to know the danger of being on a railroad track when a train was coming," she answered, "I expect so." He was trusted to go down in the city and sell newspapers. He had gone to school. The accident occurred in broad daylight, just after the noon hour. There was nothing whatever to prevent his seeing ⁴²⁸ the train coming from the west for a distance of four hundred feet.

While the law does not permit a presumption that a boy nine years old is capable of exercising that prudence which would be exacted and expected of an adult, it does require of him the exercise and care commensurate with the intelligence, capacity, and experience he is shown to possess.

As was said by Barclay, J., in *Ridenhour v. Kansas City etc. Ry. Co.*, 102 Mo. 270: "While the law makes due allowance for the thoughtlessness and indiscretion of youth, it does not hold it necessarily irresponsible. . . . To the extent that a child has knowledge and understanding of a danger, or where it is of such nature as to be necessarily obvious even to one of his years, he is under a legal duty to avoid it."

When the intelligence of this boy, testified to by his own parents, teachers, and relatives, is considered along with his experience, shown to have been acquired by living in the immediate vicinity of those tracks, and the glaring, obvious danger of standing on a railroad track on which he knew trains were constantly moving, we can discern no reason why he should not be held responsible for the recklessness of his conduct.

He was asked: "Q. Now when you got on the tracks did you look up toward the west? A. No, sir. Did you look east? No, sir. You didn't look east or west? No, sir. Did you stop right on the track? Yes, sir. You had been there a good many times? Yes, sir. You knew trains went along there repeatedly? Were passing there every few minutes? Yes, sir." He further says he was moving along in an ordinary walk. "Didn't hurry at all."

There is in this evidence not a semblance of any ⁴²⁰ kind of care, not the slightest. Notwithstanding his rashness, it appears from his own testimony that he had safely passed over the track, and yet stood there with the ice on the opposite side of the track and tied to his wrist by a string or rope, and so close that, when the engine struck the string, it threw him down and evidently brought his head in contact with some portion of the train, by which his scalp was nearly torn off and two fingers mashed.

In *Payne v. Chicago etc. R. R. Co.*, 129 Mo. 421, it was said: "Such an act of pure rashness cannot be excused even in a boy of the age and capacity of plaintiff" (an ordinary negro boy, eleven years old). It follows that no error was committed in telling the jury, under the facts of this case, that it was his duty to have used his eyes and his ears, and the modification was fully as favorable as he had any right to ask.

When the facts disclose that an infant is old enough to know the danger of going upon railroad tracks, that he is intelligent and is conversant with the management of trains thereon, we know of no principle of law which would absolve him from the duty of looking and listening for trains and from avoiding danger by getting off the tracks. In this connection the analogies of the law respecting the doctrine of *doli capax* seem pertinent, and may be invoked by way of illustration.

In cases of felonies by infants *malitia supplet aetatem* (*State v. Adams*, 76 Mo. 355), because notwithstanding the law presumes an infant between the age of seven and fourteen years *doli incapax*, yet this *prima facie* case of incapacity may be overcome by proof, and, if it is, the infant is amenable to punishment just

as an adult, and in civil actions by the infant for damages when the intelligence, experience, and capacity of the infant is shown to be commensurate with that of ⁴²⁷ an adult, and there is no conflict as to his capacity, no reason appears why this intelligence and experience should not supply the lack of age nor why a court should not declare his responsibility as a question of law.

Doubtless a boy of this age, living as plaintiff did for years in the immediate vicinity of this crossing, knew the danger that he would incur in crossing the tracks better than thousands of adults who rarely have occasion to cross railroad tracks and yet are conclusively presumed negligent if they attempt to cross them without looking or listening. Our conclusion is, that the giving of the instruction was not reversible error in view of the undisputed facts.

3. There was no error in the fifth instruction for defendant. It simply told the jury that if they found that both plaintiff and defendant were guilty of negligence which directly contributed to plaintiff's injury, plaintiff could not recover.

Plaintiff's contemporaneous concurring negligence directly contributing to his injury was a complete defense to his action. This has been the law too long to require a discussion of the grounds upon which it is based. There was no evidence that plaintiff was on the track after the train came in sight, and nothing upon which it could be assumed that the engineer could have avoided injuring him after he discovered his peril.

4. Finally, it is urged that it was error to give the seventh instruction for defendant, as follows: "If the jury believe from the evidence in the case that the plaintiff was not on the track in front of the engine when it approached from the west, at the time of the accident, but was on the outside and north of said track, then the employes in charge of said engine were not bound to know or anticipate that there was ⁴²⁸ any danger of his being hurt; and if the jury further believe from the evidence of this case that plaintiff was not on the track at the time he was hurt, but was outside of the track, and that he had a string tied to his arm, the other end of which was attached to a piece of ice, and if the jury believe that the passing engine caught the ice or string, and thereby caused the plaintiff's injury, and that fact is the sole cause of the accident, then the plaintiff is not entitled to recover, and the verdict will be for the defendant."

We think this instruction is not open to charge of unduly dwelling upon certain facts to the exclusion of others. It refers the jury to the evidence to find the substantive facts upon which

the defense is predicated. How it could have been more concisely drawn we are at a loss to know; surely there cannot be a difference of opinion among reasonable men that if such facts were found the conclusion of negligence on the part of plaintiff inevitably followed. If these facts were found, then plaintiff's injuries are due solely to his own reckless conduct, and he ought not to recover.

Upon the whole the verdict appears to be for the right party and the judgment is affirmed.

Sherwood and Burgess, JJ., concur.

NEGLIGENCE—CONTRIBUTORY—DEGREE OF CARE REQUIRED OF CHILDREN.—The ordinary care which a child of limited judgment and experience is called upon to exercise in a given act is not the same quantum of care which an adult is called upon to use in the same circumstances: *Foley v. California Horseshoe Co.*, 115 Cal. 194; 56 Am. St. Rep. 87, and note; *Norton v. Volzke*, 158 Ill. 402; 49 Am. St. Rep. 167. A child is held answerable only to the exercise of such care as is reasonably to be expected from children of his age and capacity: *Railroad Co. v. Mackey*, 53 Ohio St. 370; 53 Am. St. Rep. 641, and note; *Queen v. Dayton Coal and Iron Co.*, 95 Tenn. 458; 49 Am. St. Rep. 935.

NEGLIGENCE—CONTRIBUTORY—EFFECT OF.—Contributory negligence of a party injured, when clearly established by evidence substantially uncontradicted, is to be adjudged a defense as a matter of law by the court: *Victor Coal Co. v. Muir*, 20 Colo. 320; 46 Am. St. Rep. 299, and note; *Florida etc. Ry. Co. v. Hirst*, 80 Fla. 1; 82 Am. St. Rep. 17, and note.

STATE v. McCABE.

[135 MISSOURI, 450.]

CRIMINAL LAW—PROHIBITED USE OF UNITED STATES MAILS.—A person who sends letters or circulars to a debtor threatening to publish him as a bad debtor among his neighbors, and to advertise a claim against him for sale, is liable to prosecution and conviction, under a statute making it a misdemeanor for any person to deliver any letter, circular, etc., threatening to do injury to the "credit or reputation" of another.

CRIMINAL LAW—INFORMATION CHARGING CRIMINAL USE OF UNITED STATES MAIL.—An information charging a threat by the accused to publish the name of a debtor in a claimant agency is sufficient without alleging the connection of the accused with such agency or its character.

CONSTITUTIONAL LAW—CRIMINAL USE OF UNITED STATES MAIL.—A statute prohibiting creditors or others from threatening to injure the credit or reputation of a debtor by publishing his name as a bad debtor by means of letters or circulars, or by threatening to advertise a claim against him for sale, is not unconstitutional as depriving such creditors of the protection of their property rights, nor as restricting the freedom of speech or publication.

T. E. Mulvihill, J. L. Hopkins, and Howe & Howe, for the state.

W. H. Clark, for the respondents.

⁴⁵² GANTT, P. J. This is an appeal by the state from a judgment of the St. Louis court of criminal correction, quashing an information against the respondents.

On January 17, 1896, an information was filed in said court charging defendants with the offense of sending a threatening letter. It was quashed on motion of defendants. On January 28th, an amended information was filed by the assistant prosecuting attorney, in words and figures as follows:

In the St. Louis court of criminal correction.

| | |
|--|---------------|
| "State of Missouri, | Plaintiff, |
| vs. | |
| "Alexander McCabe, Henry S. McCabe, and H. M. Tileston, | Defendants. } |

"Richard M. Johnson, assistant prosecuting attorney of the St. Louis court of criminal correction, now here in court on behalf of the state of Missouri, amended information makes as follows:

"That Alexander McCabe, Henry S. McCabe, and H. M. Tileston in the city of St. Louis, aforesaid, on the eighth day of January, 1896, unlawfully, knowingly, and maliciously, did send and deliver to one James Post by United States mail inclosed in one envelope certain letters, writings, printings, circulars, and cards with the name and signature of 'The Claimant Agency' subscribed thereto, directed to the said James Post by the name and description of Mr. James Post signed on the back thereof, then and there and therein threatening to injure the credit and reputation of the said James Post, which said letters, writings, printings, circulars, and cards were and are in words and figures as follows, that is to say—

⁴⁵³ "The Claimant Agency (incorporated).

"Room 120, Laclede Building, St. Louis, Mo., 1-18, 1896.

"We are authorized to publish in our "For Sale" columns, the claim we hold against you. You have ignored it so long, the patience of your creditor has become exhausted.

"The "Claimant" will contain the same in its next issue. We must also place every month in the houses opposite and adjacent to your residence, fifty of the inclosed circulars directed to your address.

"If you are unable to settle in full, a payment will stop proceeding against you, as well as publication of the debt.

"Respectfully,

"THE CLAIMANT AGENCY.

"Make settlement direct with this office."

"The claim of \$—— we hold against you is yet unpaid. "Honesty is the best policy." Call and make arrangements to settle the debt.

"Complimentary. The Claimant Agency. Publishers, Room 120, Laclede Building, St. Louis.

"Fill out the coupon and return to us with list of accounts. We will offer for sale Ten Claims Complimentary and mail copy of "The Claimant" containing same to each debtor. Before publishing we will endeavor to obtain some money for you on the accounts."

"The Claimant Agency.

"Collection Department. Our regular membership fee is \$10.00 per year, including subscription to "The Claimant." Claims "For Sale" can be inserted therein at the rate of 25 cents per name, per month, by nonmembers."

"For sale, the following judgments: Against Leon D. Boucher, 1049 De Hodiamont avenue, \$24.88 for unpaid grocery bill. Against George W. Ferguson, ⁴⁵⁴ 5036 Bell avenue, \$64.25, for unpaid grocery bill. Against John J. McCann, 1710 Chestnut street, \$29.95, for unpaid grocery bill. The Claimant Agency (incorporated), Publishers and Collectors, Room 120, Laclede Building, St. Louis, Mo."

"Which said letters, writings, printings, circulars, and cards were sent out and delivered through the United States mails to the said James Post by said defendants, unlawfully, knowingly, and maliciously for the purpose of and therein threatening to injure the credit and reputation of the said James Post, by bringing him into disrespect and disrepute with his friends, neighbors, and associates, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state.

"RICHARD M. JOHNSON.

"Asst. Pros. Atty. for St. Louis Court of Criminal Correction."

Subscribed and sworn to by James Post, January 28, 1896, before the clerk of said court.

On the same day the defendants filed their motion to quash, in the following words: "1. Said information is not sufficient in law; 2. Said information is not sufficient in substance; 3. Said

information is vague, indefinite, and uncertain; 4. Several distinct charges against these defendants are alleged in said information in one count; 5. The acts charged against these defendants in said information are such as these defendants have an inherent right to do, which right is guaranteed to them, and each of them, under and by the constitution of the state of Missouri, and under and by the constitution of the United States of America; ⁴⁵⁵ 6. Said information fails to inform these defendants with certainty as to the nature and cause of the accusation against them, therein violating the provisions of the constitution of the state of Missouri, and the constitution of the United States of America; 7. Said information is in violation of the provisions of the constitution of the state of Missouri, and of the United States of America with reference to the deprivation of life, liberty, and property without due process of law; 8. Said information affirmatively shows that neither of these defendants is guilty of any offense against the laws of the state of Missouri, such as is charged against them therein; 9. Said information affirmatively shows that neither of these defendants is guilty of any offense against the laws of the state of Missouri; 10. The names of all material witnesses are not indorsed upon said information."

This motion also was sustained, and the prosecuting attorney took all proper steps to have said ruling of the court reviewed in this court, on the ground that the decision of the cause involved the construction of the constitution of the United States and of this state: Mo. Const., art. 6, sec. 12.

The information was intended to charge an offense under section 3782 of the Revised Statutes of 1889, which provides that "every person who shall knowingly send or deliver any letter, writing, printing, circular, or card, with or without a name subscribed thereto, or signed with a fictitious name, or any letter, mark, or device, threatening to accuse any person of a crime, or to kill, maim, or wound any person, or to do any injury to the person, property, credit, or reputation of another, though no money or property be demanded or extorted thereby, shall, on conviction, be adjudged guilty of a misdemeanor." ⁴⁵⁶ It will be observed that this section, which was numbered 1526 of the Revised Statutes of 1879, has been amended by inserting the words "credit or reputation."

The St. Louis court of appeals in *State v. Barr*, 28 Mo. App. 84, in 1887 held that the sending of a letter threatening to publish a person's name in a "dead-beat" book whereby his credit would be ruined, was not an offense under section 1526 of the

Revised Statutes of 1879, because "credit and reputation" were not property within the meaning of the section as it then read.

It is obvious that the insertion of "credit and reputation" in the next revision after the promulgation of that decision was intended to cover threats of injury to the credit or reputation as well as to property or person.

The information sufficiently charges that the defendants sent a letter to the prosecuting witness which contained circulars and writings threatening to injure his credit among his neighbors and fully set out the means and the character of the agencies which would be adopted and employed to effectually destroy his credit and reputation, to wit, by placing every month in the houses opposite and adjacent to his residence fifty of the circulars inclosed, directed to his address.

The point made that there is no allegation as to what "The Claimant Agency" was, or how defendants were connected with it, is without force, for the reason that it is wholly immaterial whether it is a corporation or a firm name, or wholly fictitious. The offense charged is, that defendants sent these threatening circulars and writings. They are guilty in lending themselves to this scheme of destroying the credit and reputation of the prosecuting witness. They were fully ⁴⁵⁷ advised in the information of the nature and character of the offense with which they were charged.

They raise the question of the constitutionality of the law itself. They assert that, conceding they did threaten to ruin the credit and reputation of the prosecuting witness as a business man, they were guilty of no offense under the laws of this state, because they say they had a right to do so.

Let us examine this contention. Can it be maintained that the guaranty in the federal and state constitutions of life, liberty, and property justifies any citizen in threatening to destroy the credit or reputation of another citizen? If it can, then it amounts to this, that not only are the courts open to him to obtain a judgment for any sum due him, and the process of the law is awarded him to enforce that judgment, but, in addition thereto, he has the right to threaten the publication of a criminal libel whereby he may destroy his debtor's credit and reputation. More than this, he may avoid the courts altogether, deprive his debtor of all just credits and setoffs, all lawful pleas in defense, and, through fear of the ruin of his credit, he may even collect an unjust debt or obtain an unconscionable advantage. The law will not countenance or tolerate this method of collecting debts.

The state has provided every needed remedy, both ordinary and extraordinary, to enforce the payment of all just debts through the agency of her courts of justice, and among these remedies is not included the right to threaten to destroy credit and reputation. Such a course is well calculated to produce a breach of the peace. If once permitted and sanctioned by the courts, it will soon degenerate into an intolerable and oppressive wrong. Unjust claims will be extorted from timid debtors. Honest and deserving men will be held up to scorn and published as dishonest merely because ⁴⁵⁸ they have not the means with which to meet their obligations.

The position of counsel that because a man is too poor or unable to meet all his obligations as soon as due that no wrong can come to him by publishing his inability to do so in the most offensive manner cannot be countenanced by this court. It is alike unsound in law and morals. The law does not authorize the collection of even just debts by the malicious threatening to injure the debtor in his person, property, credit, or reputation. To deny him the privilege of so doing in no sense deprives him of the protection of his property rights under the bill of rights or constitution.

Does it trench upon that other constitutional right securing freedom of speech, which guarantees "that every person shall be free to say, write, or publish whatever he will on any subject, being responsible for all abuse of that liberty?"

Judge Cooley in his great work on Constitutional Limitations, sixth edition, page 518, says: "The constitutional liberty of speech and of the press, as we understand it, implies a right to freely utter and publish whatever the citizen may please, and to be protected against any responsibility for so doing except so far as such publications from their blasphemy, obscenity, or scandalous character may be a public offense or as by their falsehood and malice they may injuriously affect the standing, reputation, or pecuniary interests of individuals."

The constitution grants no immunity from punishment for criminal libels. Libel is defined by our law as follows: "A libel is the malicious defamation of a person made public by any printing, writing, sign, picture, representation, or effigy, tending to provoke him to wrath or expose him to public hatred, contempt, or ridicule, or to deprive him ⁴⁵⁹ of the benefits of public confidence and social intercourse; any malicious defamation made public as aforesaid designed to blacken and villify the

memory of one who is dead, and tending to scandalize or provoke his surviving relatives and friends."

As was said in *State v. Armstrong*, 106 Mo. 395, 27 Am. St. Rep. 361: "The evident purpose and design of the defendants and the association they employed . . . was to publish the prosecutor as a bad debtor, a dishonest person who would not pay his honest debts, and to degrade him in the eyes of the public, and as such clearly libelous and within the meaning of the statute."

The proposed mode of publishing the threatened libel clearly indicates that it was actuated by malice. There is nothing in the bill of rights which would exonerate defendants from responsibility for such a criminal libel if actually uttered and published, nor to shield them from the offense denounced against sending a letter threatening to so libel him. The reason why libelous publications are public offenses is their direct tendency to provoke breaches of the public peace by the injured parties, and their friends and families to acts of revenge, and the same reason underlies statutes against letters which threaten extortion by means of libel. Such statutes do not infringe the constitutional right of any law-abiding citizen.

Communications of this character with the intention of extorting money have been the common subjects of legislation both in England and the states of this Union (2 Archbold's Criminal Practice and Pleading, 1060, and notes), and such laws have never been supposed to be obnoxious to freedom of speech as understood in our free institutions. On the contrary, it is a libel on the bill of rights which guarantees free speech to assert that it was intended to protect anyone in ⁴⁰⁰ such despicable practices: *State v. Goodwin*, 37 La. Ann. 713.

Without further elaboration we hold that the court of criminal correction erred in quashing the information and its judgment is reversed and the cause remanded.

Sherwood and Burgess, JJ., concur.

Criminal Uses of the United States Mails.

Obscene Matter.—Section 3893 of the Revised Statutes of the United States provides that "Every obscene, lewd, or lascivious book, pamphlet, picture, paper, letter, writing, print, or other publication of any indecent character, and every article or thing designed or intended for the prevention of conception or procuring of abortion, and every article or thing intended or adopted for any indecent or immoral use, and every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where or how, or of whom, or by what

means, any of the hereinbefore mentioned matters, articles, or things may be obtained or made, whether sealed as first class matter or not, are hereby declared to be nonmailable matter, and shall not be conveyed in the mails, nor delivered from any postoffice nor by any letter carrier, and any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything declared by this section to be nonmailable matter, and any person who shall take the same, or cause the same to be taken, from the mails for the purpose of circulating or disposing of, or of aiding in the circulation or disposition of the same, shall, for each and every offense, be fined, upon conviction thereof, not more than five thousand dollars, or imprisoned at hard labor not more than five years, or both, at the discretion of the court." Under this statute, the test of obscenity is, whether the tendency of the matter charged is to deprave and corrupt the morals of those whose minds are open to such influences, and into whose hands a publication of the sort may fall: *United States v. Bennett*, 16 Blatchf. 338. The matter must be offensive to the common sense of decency and modesty of the community and of such character as to deprave and corrupt the morals and minds of those who are open to such immoral influences: *United States v. Harmon*, 45 Fed. Rep. 414; *United States v. Clarke*, 38 Fed. Rep. 732; *United States v. Harman*, 38 Fed. Rep. 827. Obscene matter applies to language, written or printed, or to pictorial productions, and includes what is immodest and indecent, and is calculated to excite impure desires, or to corrupt the mind: *United States v. Males*, 51 Fed. Rep. 41. A lewd book, pamphlet, or paper, within the meaning of the statute, is one that describes dissolute or unchaste acts, scenes, or incidents, or one the reading whereof, by reason of its contents, is calculated to excite lustful and sensual desires in those whose minds are open to such influences: *United States v. Clarke*, 38 Fed. Rep. 732; *United States v. Bennett*, 16 Blatchf. 338. A newspaper intended for miscellaneous circulation, relating to the prevalence of sexual abuse, expressed in blunt, coarse terms too indecent for publication, is obscene, within the meaning of the statute: *United States v. Harmon*, 45 Fed. Rep. 414; *United States v. Harman*, 38 Fed. Rep. 827; *United States v. Chesman*, 19 Fed. Rep. 497. Obscene matter under the statute applies, only to matters tending to excite impure or unchaste thoughts, and not language which is merely coarse, vulgar, and indecent: *United States v. Males*, 51 Fed. Rep. 41; *United States v. Durant*, 46 Fed. Rep. 753; *United States v. Clark*, 43 Fed. Rep. 574. Thus a letter, though exceedingly coarse and vulgar, and grossly libelous, but which has no tendency to excite libidinous thoughts or impure desires, or to deprave or corrupt morals, is not within the meaning of the statute: *United States v. Wightman*, 29 Fed. Rep. 636. Letters which are free from lewd and indecent language, expressions, or words, although they have been written for the purpose of seduction, or to obtain meetings for immoral purposes, are not within the meaning of the statute: *United States v. Lamkin*, 73 Fed. Rep. 459.

Prior to 1888 the statute above quoted did not contain the word "letter," and as the decisions were conflicting as to whether or not

an obscene letter inclosed in an envelope, upon the face of which there was nothing but the name and address of the party, was within the prohibition of that statute as it then stood, the word "letter" was inserted in the statute by Congress in 1888. The better opinion seems to be that knowingly depositing an obscene letter in the mails, prior to 1888, inclosed in an envelope or wrapper upon which there was nothing but the name and address of the person to whom such letter was written, was not an offense under the statute as it originally stood and as it was passed in 1876: *United States v. Chase*, 135 U. S. 255; *United States v. Loftis*, 8 Saw. 194; *United States v. Huggett*, 40 Fed. Rep. 636; *United States v. Mathias*, 36 Fed. Rep. 892; *United States v. Comerford*, 25 Fed. Rep. 902. On the other hand many well-considered cases have held that such letters were "writings" within the meaning of the statute as it was originally enacted in 1876 and prior to the amendment of 1888, and that obscene letters inclosed in envelopes upon which no obscene matter appeared were nonmailable: *United States v. Gaylord*, 17 Fed. Rep. 438; *United States v. Hanover*, 17 Fed. Rep. 444; *United States v. Britton*, 17 Fed. Rep. 731; *United States v. Morris*, 18 Fed. Rep. 900; *United States v. Thomas*, 27 Fed. Rep. 682. Under the statute as it now stands and as quoted at the beginning of this note, the mailing of a private sealed letter containing obscene matter in an envelope on which nothing appears but the name and address is an offense: *Andrews v. United States*, 162 U. S. 420; 58 Fed. Rep. 861; *United States v. Nathan*, 61 Fed. Rep. 936; *United States v. Ling*, 61 Fed. Rep. 1001; *United States v. Gaylord*, 50 Fed. Rep. 410; *In re Wahl*, 42 Fed. Rep. 822; *Grimm v. United States*, 156 U. S. 604. This must now be taken to be the settled rule under the decision in *Andrews v. United States*, 162 U. S. 420, disapproving the contrary ruling made in *United States v. Warner*, 59 Fed. Rep. 355; *United States v. Jarvis*, 59 Fed. Rep. 857, and *United States v. Clark*, 43 Fed. Rep. 574.

A letter from a man to an unmarried woman, proposing a clandestine trip to an adjacent town, to return the next morning, he to pay her expenses and five dollars in addition, is an obscene letter within the meaning of the statute, although it contains no obscene language: *United States v. Martin*, 50 Fed. Rep. 918. An illustrated pamphlet, purporting to be a work on the treatment of spermatorrhoea and impotency, and consisting partially of extracts from standard books upon medicine, but of an indecent and obscene character, and intended for general circulation is nonmailable and the mailing thereof is an offense: *United States v. Chesman*, 19 Fed. Rep. 497. And the same rule applies to a pamphlet purporting to be a medical treatise on the subject of certain foul private diseases and their cure, although it contains no illustrations and is couched in clean and decent language: *United States v. Smith*, 45 Fed. Rep. 476. Mailing letters giving information where obscene pictures can be obtained is a crime under the statute: *United States v. Grimm*, 50 Fed. Rep. 528; 156 U. S. 604.

Inclosing a newspaper containing obscene matter in a wrapper does not prevent the mailing thereof from falling under the ban

of the statute: *United States v. Janes*, 74 Fed. Rep. 545. Knowingly depositing in the mail an advertisement or a newspaper containing an advertisement, by a publisher or other person, purporting to give information how and where an article or articles for the prevention of conception, or the production of an abortion can be obtained, is a crime: *United States v. Kelly*, 3 Saw. 566; *United States v. Foote*, 13 Blatchf. 418. And it makes no difference that the advertised article will not produce the effect claimed for it, or that it cannot be obtained at the place designated: *United States v. Whitehead*, 11 Blatchf. 346.

Under a state statute making it criminal to send or convey an insulting, indecent, lascivious, disgusting, or annoying letter or communication to any female, the mailing of an indecent and insulting letter in a sealed envelope directed to the husband of a woman, requesting him to hand it to her, is a crime: *Larison v. State*, 49 N. J. L. 256; 60 Am. Rep. 606. The word "paper," as used in a state statute making it criminal to send lewd and obscene matter by mail, includes letters: *Thomas v. State*, 103 Ind. 419.

Prepayment of postage on obscene matter deposited in the mails is not an essential element of the offense: *United States v. Janes*, 74 Fed. Rep. 545. Nor is the fact that the defendant did not regard the matter deposited in the mails, such as the statute forbade to be carried, any defense: *Rosen v. United States*, 161 U. S. 29; *Price v. United States*, 165 U. S. 311.

Dunning Letters or Cards.—The act of Congress of September 26, 1888 (25 Stats. at Large, 496; 1 Supp. to U. S. Rev. Stats. 621), provides "that all matter otherwise mailable by law, upon the envelope or outside cover or wrapper of which, or any postal card upon which any delineations, epithets, terms or language of an indecent, libelous, scurrilous, defamatory, or threatening character, or calculated by the terms or manner or style of display, and obviously intended to reflect injuriously upon the character or conduct of another, may be written or printed or otherwise impressed or apparent, are hereby declared nonmailable matter," and prescribing a penalty for knowingly depositing in, or taking from the mails such letter, paper, or postal card for the purpose of circulating or disposing of it. In *United States v. Dodge*, 70 Fed. Rep. 235, it was shown that the proprietor of a collection agency adopted a method by which, on the failure of debtors to pay on first demand, a dunning letter was sent through the mails, inclosed in a pink colored envelope, and, if this did not meet with a favorable response, another letter was sent inclosed in a black envelope addressed in white letters. The purpose of these letters was universally known to the postoffice employes. It was held that such use of envelopes was a "delineation" within the meaning of the statute, and that they were nonmailable matter. Mailing a letter inclosed in an envelope on which appear the words "Excelsior Collection Agency" in full-faced capital letters occupying more than half of the envelope, and so placed as to be entirely separate from the direction to return to the sender, is a crime within the meaning of the above statute: *United States v. Brown*, 43 Fed. Rep. 135. The

statute has been held not to apply to printed papers not inclosed in wrappers, but merely folded and postage stamps placed on the papers themselves: *United States v. Gee*, 45 Fed. Rep. 194. But a paper deposited in the mails and issued by a collection agency, containing on its first page and outside cover a motto showing that its purpose is to collect debts, and a large part of the paper contains notices warning the public against persons alleged to have failed to pay their debts, and asking for information as to such persons, is within the ban of the statute, especially when it is shown that if accounts were sent to such agency for collection, the debtor was notified that, if not paid, the account would be advertised in such paper for sale, and that the paper contained many such advertisements: *United States v. Burnell*, 75 Fed. Rep. 824. Posting a letter threatening to publish a debtor as a "dead beat" is not a crime within the meaning of section 3893 of the Revised Statutes of the United States, as such statutes relate only to such matter as is impure and immodest and which tends to corrupt the morals of the people: *Ex parte Doran*, 32 Fed. Rep. 76. But the person posting such a letter could undoubtedly be punished under the federal statute of 1888, now under consideration. Sending a respectable dunning letter in an unsealed envelope, on which is printed the words "Mercantile Protection and Collection Bureau" in long primer type, is not forbidden by such statute: *In re Barber*, 75 Fed. Rep. 980. A postal card demanding payment of a debt and stating that if it is not paid at once the account will be placed in the hands of a lawyer for collection, is nonmailable matter: *United States v. Bayle*, 40 Fed. Rep. 664. A postal card sent by a creditor to his debtor, demanding payment of a note, and adding, "You have been fighting time all along. I will garnishee and foreclose. But I do so dislike to do this, if you will only be half white," is nonmailable: *United States v. Smith*, 69 Fed. Rep. 971. Postal cards containing statements that "You have promised, and do not perform," and "I see very plainly you do not intend to pay any attention to my letters or your agreements," are also nonmailable: *United States v. Simmons*, 61 Fed. Rep. 640. A postal card concerning the return of an article of property, containing words ordinarily called profane, and expressions too vulgar for quotation by the court, the indecency of which is disguised by the use of an initial letter is nonmailable matter, and the person depositing it in the postoffice is liable to punishment: *United States v. Davis*, 38 Fed. Rep. 326. A postal card stating that, "It is with regret that I once more ask you to take your choice. I will vindicate myself if I live. The truth and the whole truth must come out," is nonmailable, as containing a threat: *Griffin v. Pembroke*, 64 Mo. App. 263. A postal card containing the words, "Please call and settle account, which is long past due, and for which our collector has called several times and oblige," is not within the prohibition of the statute: *United States v. Bayle*, 40 Fed. Rep. 664. Nor is a postal card containing notice that rent is due and unpaid, and if not paid by a certain date "the matter would be placed in the hands of an officer," nonmailable matter: *United States v. Elliott*, 51 Fed. Rep. 807.

Threatening Letters.—Several of the states of the Union have statutes making it a crime to send letters or communications threatening to accuse another of a crime or offense with intent to extort money. Under such statutes, it is not necessary for the prosecution to show that the threat was against the person to whom the letter was sent or addressed, or that the writer or sender of the letter was the one threatening to do the wrongful act. The crime may be committed by one who sends a letter conveying a threat of some other person to do the forbidden act, provided he sends the letter for the unlawful purpose mentioned in the statute, nor is it necessary to constitute the crime that the threat should inspire fear, or that it should be calculated to produce terror. If the threat be of the kind mentioned in the statute, and be made or conveyed with the intent mentioned, the crime has been committed, however far the threat may have fallen short of its purpose: *People v. Thompson*, 97 N. Y. 313. A threat, in a letter sent to extort money, "to proceed against you criminally" is equivalent to a threat to accuse the person of a crime, and it is no defense that the person sending the letter believed the party to whom it was sent was guilty of the crime charged: *People v. Elchler*, 75 Hun, 28. An accusation in writing of an act involving moral turpitude, known by the writer to be false, accompanied with a suggestion that legal proceedings will be taken, unless the person to whom the letter is sent purchase silence, is a threat within the statute, although, in form, the accused is only called upon to render satisfaction for that which, if the charge were true, would entitle the accuser to pecuniary compensation: *People v. Wightman*, 104 N. Y. 593. A letter containing a threat, made for the purpose of inducing an appellant to dismiss an appeal, is within the meaning of a statute against extortion: *People v. Cadman*, 57 Cal. 502. A letter requesting the person addressed to send the writer ten dollars, under threat that he will be indicted if he does not comply with such request, is extortion within the meaning of the statute: *State v. Patterson*, 68 Me. 473. If a note is made without the stamp required by law, and the payee therein writes a letter to the maker in which he says that: "Upon examining the excise law, I find that note you made me requires stamp, and that you are liable to fine of two hundred dollars for not stamping it. You will please call immediately and make satisfaction and save yourself trouble," the writer is not guilty of sending a threatening letter with intent to commit extortion: *Brabham v. State*, 18 Ohio St. 433. A letter threatening to publish a person's name, as a "dead beat," the effect of which may be to ruin his credit, is not within the meaning of a statute making it crime to send a letter threatening to do injury to the "person or property" of another. Credit or reputation is not "property" within the meaning of the statute: *State v. Ban*, 28 Mo. App. 84.

Lotteries.—Section 3894 of the Revised Statutes of the United States, as amended by the act of September 19, 1890 (26 Stats. at Large, 465), provides: "Nor shall any newspaper, circular, pamphlet, or publication of any kind, containing any advertisement of any

lottery or gift enterprise of any kind offering prizes dependent upon lot or chance, be carried in the mails," and makes the person who knowingly deposits in or sends through the mails such matter guilty of a misdemeanor. Under this statute, a scheme for increasing the circulation of a newspaper, whereby all paid-up subscribers receive numbered tickets corresponding to numbered coupons, which are drawn from a lot by a blindfolded person, prizes to be given to the holders of certain tickets, is a lottery: *United States v. Wallis*, 58 Fed. Rep. 942. Government bonds, issued under a scheme, in which the time of redemption and certain premiums or prizes to be awarded to some of the holders are fixed by a drawing, are lotteries, and the mailing of circulars announcing the redemption of certain bonds and the date of the next drawing is a crime: *Horner v. United States*, 147 U. S. 449; *United States v. Politzer*, 59 Fed. Rep. 272. A citizen who mails a letter to a lottery dealer ordering lottery tickets, and inclosing the funds to pay for them, does not commit a crime within the meaning of the statute: *United States v. Mason*, 22 Fed. Rep. 707.

Schemes to Defraud.—Section 5480 of the Revised Statutes of the United States makes a misdemeanor, and provides for punishment by fine and imprisonment, the act of devising a scheme to defraud, to be effected by opening correspondence with another person by means of the postoffice department and the placing of any letter in the postoffice in execution of such scheme, under this statute, forming a plan to defraud by ordering goods by mail, with the intention of not paying for them, under the false pretense that the person ordering the goods is a merchant, is a scheme to defraud, and the act of mailing a letter ordering goods in pursuance of such scheme is an indictable offense: *United States v. Watson*, 35 Fed. Rep. 358. One who advertises under various titles for agents to sell goods and distributes circulars without intending to employ such agents, but intending to incite persons reading such advertisements or circulars to send him money for outfits or sample cases, with intent to cheat persons thus sending him money, by converting it to his own use, and who, to carry out such scheme takes a letter and packet from the postoffice, and deposits a letter and packet in the postoffice, is guilty of a misdemeanor under the above-named statute: *United States v. Stickle*, 15 Fed. Rep. 798. One uses the mails for a fraudulent purpose, within the meaning of the statute, who represents himself to be the president of a publishing company, and falsely pretends, by means of letters and circulars deposited in the mails by him, that he desires to employ agents to sell books, when in fact his sole purpose is to induce such agents to make deposits of money, which he intends to convert to his own use: *United States v. Finney*, 45 Fed. Rep. 41. One who deposits letters in the mails in furtherance of a scheme to defraud by soliciting money from the parties addressed, upon representations that by an unknown power he is able to answer sealed letters addressed to spirit friends of his correspondents, is guilty of a misdemeanor: *United States v. Bied*, 42 Fed. Rep. 134.

One who sends circulars through the mails to certain persons, representing that he has a certain high grade wheat which he will furnish at a certain price per bushel, and keeps the money of those who send it to him for wheat, relying upon his representations, and who sends them no wheat or other thing in exchange for their money, is guilty of using the mails in furtherance of a scheme to defraud: *United States v. Staples*, 45 Fed. Rep. 195. And one who, through the mails, induces newspaper publishers to insert advertisements in their papers on a promise to pay the bills therefor when rendered, if he has no intention of fulfilling his promise, is guilty of using the mails for the purpose of defrauding: *United States v. Staples*, 45 Fed. Rep. 195. One who devises a scheme to put counterfeit money or obligations in circulation, and uses the mails in furtherance of and to perfect his scheme, is guilty of using the mails in a scheme to defraud, even though the person addressed in his letters is not actually defrauded by the scheme, but is expected to defraud someone else by passing the money or obligations at their face value: *United States v. Jones*, 20 Blatchf. 235; *Streep v. United States*, 160 U. S. 128. The statute applies to any person who devises either a scheme to defraud, or a scheme to sell counterfeit money or obligations, provided the scheme is intended to be effected and is effected by communications through the mails: *Streep v. United States*, 160 U. S. 128-132. An attempt to defraud a creditor by inclosing with a letter to him worthless slips of paper in place of money stated by such letter, to be inclosed therewith, and sending such matter to the creditor through the mails is not an indictable offense: *United States v. Owens*, 17 Fed. Rep. 72. "It appears to the court that the act was designed to strike at common schemes to defraud, whereby, through the postoffice, circulars, etc., are distributed, generally to entrap and defraud the unwary and not the supervision of commercial correspondence solely between a debtor and creditor": *United States v. Owens*, 17 Fed. Rep. 72-74.

Stealing or Embezzling Letters.—Section 5467 of the Revised Statutes of the United States makes it a crime for any person employed in any department of the postal service to secrete, embezzle, or destroy any letter containing any article of value, intrusted to him, or which shall come into his possession, and which was intended to be conveyed by mail, or carried or delivered by any mail carrier, etc. This statute defines and punishes two crimes, one the secreting, embezzling, and destroying letters containing any thing of value, and the other the stealing the contents of such letters: *United States v. Pelletreau*, 14 Blatchf. 126; *United States v. Delaney*, 55 Fed. Rep. 475; *United States v. Lacher*, 134 U. S. 624. An errand boy, who is authorized to call for and receive his employer's letters arriving by mail, and who, after receiving such letter containing an article of value, embezzles it, cannot be prosecuted and convicted of taking the letter from the mail and embezzling it, because the taking was lawful: *United States v. Driscoll*, 1 Low. C. C. 3-33. On the trial of an indictment against a letter carrier or other postal employe, charged with secreting, embezzling, or destroying a letter

containing an article of value, the fact that the letter taken was a decoy is no defense. The postal employé's duty is the same, whether a letter is genuine or a decoy addressed to a fictitious person: *Goode v. United States*, 159 U. S. 663; *Montgomery v. United States*, 162 U. S. 410; *Walster v. United States*, 42 Fed. Rep. 891; *United States v. Wight*, 38 Fed. Rep. 106; *United States v. Bethea*, 44 Fed. Rep. 802, refusing to follow *United States v. Denicke*, 35 Fed. Rep. 47, and *United States v. Matthews*, 35 Fed. Rep. 890, which hold a contrary doctrine and maintain that a decoy letter with a fictitious address cannot be delivered, and therefore is not "intended to be conveyed by mail" within the meaning of the statute. This ruling is clearly erroneous under the decisions of the United States supreme court cited above. The abstracting from a letter in a registered mail package of a silver certificate by a railway postal clerk, after he has received it as such, and while in his possession to be conveyed by him as other registered mail, though a decoy, and placed there to give him a chance to take it, is a crime under the statute: *United States v. Dorsey*, 40 Fed. Rep. 752. Letters stamped and postmarked as coming from other offices, but which, in fact, are placed upon the distributing table by the postmaster and an inspector, addressed to a company in the same town which gets its mail from the office in a pouch of its own, are, if it is not the intention to intercept them before delivery to the proper address, letters "intended to be conveyed by mail," though they are decoys, and the embezzlement thereof by a postoffice employé is a crime within the meaning of the statute: *Walser v. United States*, 42 Fed. Rep. 891. A letter once placed in the postoffice is in the custody of the law, and no one, except the writer and the person to whom it is directed or someone authorized by him, has the right while it is there to open it for the mere purpose of ascertaining its contents. Neither postmasters, postoffice agents, nor officers of any kind have any authority to open letters while in the postoffice, under the pretext that there may be something improper, or even criminal, written therein. The act of opening a letter in such manner is a crime: *United States v. Eddy*, 1 Bliss. 227; *United States v. Parsons*, 2 Blatchf. 104; *United States v. Pond*, 2 Curt. C. C. 285.

Criminal Libel may be committed by sending through the mail an envelope having printed on it in large letters the words "Bad Debt Collecting Agency": *State v. Armstrong*, 106 Mo. 395; 27 Am. St. Rep. 361. It is also criminal libel to send a letter addressed to the wife of another, importing that she has acted libidinally toward the writer and invited him to adulterous intercourse with her, and which is sent to her with intent to insult and abuse her, to seduce and debauch her affections from her husband, and bring her into hatred and contempt: *State v. Avery*, 7 Conn. 268; 18 Am. Dec. 105.

MOODY v. PEYTON.

[185 MISSOURI, 482.]

JUDGMENTS AGAINST ADMINISTRATORS establishing debts against their estates are, in the absence of fraud, equally conclusive upon the administrators and the heirs, both as to the personalty and realty belonging to their estates.

JUDGMENTS—IMPEACHMENT FOR FRAUD.—A judgment can be impeached for fraud only when satisfactory evidence is offered that such impeaching fraud occurred in the very concoction or procurement of the judgment.

JUDGMENTS OF PROBATE COURTS—CONCLUSIVENESS. A judgment of allowance of a claim entered by a probate court possesses the same conclusive force as the judgments of other tribunals.

JUDGMENTS OF PROBATE COURTS—CONCLUSIVENESS. A judgment of allowance by a probate court of a note given by the decedent for the purchase price of lands is conclusive against his heirs, in an action to enforce the vendor's lien.

Burney & Burney and N. M. Givan, for the appellants.

J. H. Kyle and R. T. Railey, for the respondents.

⁴⁸⁶ SHERWOOD, J. Proceeding to enforce vendor's lien on the following described property in Harrisonville, Missouri, to wit, the east half of blocks number 185 and 186, and ten feet off the north side of block number 193.

Plaintiff, as the guardian and curator of his son, by order of the probate court, and on his own behalf, sold the land aforesaid to Sarah E. Peyton for four thousand dollars, ⁴⁸⁷ one hundred dollars of which she paid down, and for the balance gave her promissory note, receiving in return a title bond and was placed in possession of the land, which she continued to occupy from June 1, 1891, till August of that year, when she died, and since that time the premises have been occupied by her children up to 1893, and since then her administrators have rented the same, such premises having been inventoried by such administrators as the property of Sarah E. Peyton's estate.

In 1892 the note aforesaid was allowed in the probate court of Cass county. On its presentation, however, for allowance, resistance thereto was made by the administrators, who filed a formal answer to the effect that Mrs. Peyton was, by reason of sickness and otherwise, incapable of making a contract at the time she contracted for the premises and gave her note therefor; that the adult plaintiff took advantage of her weakness and diseased condition, and induced her to purchase the land and to sign the note therefor, and that the title to the land was invalid, etc.

To this answer a reply was filed and the probate court found the issues for the plaintiff in that suit, and allowed the note as already stated.

From this judgment of allowance the administrators appealed to the circuit court, where they dismissed their appeal in December, 1892, when the judgment of allowance was affirmed.

The answer of the administrators in the present proceeding is substantially the same as that filed in the probate court, and the children and heirs of Sarah E. Peyton also joined in said answer, in which defendants offered to rescind the contract and to surrender possession of the premises, etc.

The reply of plaintiffs to this answer was in substance the same as their former reply, and also pleaded ⁴⁸⁸ as res judicata the judgment of allowance on the note in the probate court.

From the records of the probate court offered in evidence herein, the following appeared: "The hour of 9 o'clock A. M. arrived, and come also plaintiffs and defendants by their attorneys, and the trial of this cause is resumed. The court having heard the evidence on behalf of defendants, introduced to sustain the issues in their answer, and considered plaintiffs' demurrer to the same, doth sustain said demurrer and order that demand of plaintiffs be allowed, four thousand two hundred and thirty-two dollars and eighty cents, and assign to class 5; interest eight per cent."

Plaintiffs in their pleadings and on the hearing tendered a deed for the premises.

It was alleged in the petition that no part of the note or judgment in the probate court had ever been paid, and that the estate of Sarah E. Peyton was insolvent. The latter allegation was not contradicted in the answer, and, besides, was shown to be true. Judge Glenn (the probate judge) testifying at the trial respecting the insolvency of the estate: "My opinion is, that it will not pay out, leaving out this claim; that it will fall some short." And it was also admitted at the trial no part of the note or judgment thereon had ever been paid.

On the foregoing premises the circuit court found for plaintiffs, and entered a decree enforcing a lien against the land, which was all that was asked in the petition.

As will have been observed, this controversy hinges on the point whether the judgment of allowance on the note in the probate court bound the heirs of the decedent, Sarah E. Peyton.

The authorities cited on behalf of defendants established that a judgment against an administrator is conclusive as to the personal estate, but only *prima facie* ⁴⁸⁹ as to the realty, and that

the heir has a right to his day in court to dispute the correctness of the demand allowed against the administrator. The reason given for this is, that there is no privity between the administrator and the heir.

In a recent work, however, it is said: "So far as the personal estate of a decedent is concerned, it does not technically descend to the heirs, but passes to the administrator or executor, through whom they take as distributees. Hence, in regard to that part of the estate, the privity between them and him is complete": 2 Van Fleet on Former Adjudications, sec. 465.

In some of the states it is held that a judgment against an administrator is no evidence of a debt as against the heirs in a proceeding to sell land to make assets with which to pay it. In others, a majority, it is held that such judgment is *prima facie* evidence against the heirs.

But, in North Carolina, it has been ruled that such judgment, in the absence of fraud or collusion, is conclusive on the heirs as well as the administrator, as establishing the debt, and, this being established, subsists in full force for subjecting all the estate of a debtor, real as well as personal, the former after the latter, to the payment of his liabilities: *Speer v. James*, 94 N. C. 417; *Proctor v. Proctor*, 105 N. C. 222.

And the rule is, that when a judgment is sought to be impeached on the ground of fraud, that such impeachment can only occur when satisfactory evidence is offered that such impeaching fraud occurred in the very concoction or procurement of the judgment. Nothing short of this will answer: *Bigelow on Fraud*, 86-88, 90, 94, 95, 636; *Payne v. O'Shea*, 84 Mo. 129; *McClanahan v. West*, 100 Mo. 320; *Oxley Stave Co. v. Butler Co.*, 121 Mo. 630, and cases cited; *Nichols v. Stevens*, 123 Mo. 116; 45 Am. St. Rep. 514.

⁴⁹⁰ In this case, as there was no attempt made to prove that fraud was exhibited as above indicated, therefore the evidence was properly rejected, on this consideration alone. The ruling in North Carolina on the point in hand commends itself to our approval, and we indorse it in blank.

There is no sound reason, in our opinion, in holding that a judgment recovered against an administrator should be conclusive on the heir as to the personalty, but worthless or only *prima facie* evidence against him when it comes to the realty. How one and the same judicial determination could have two such distinct probative effects and consequences as to be conclusive as to one species of property and only *prima facie* as to another, both be-

longing to the same estate, is truly remarkable. At common law, the reason a judgment bound the estate under administration, to wit, the personalty, but did not bind the heir at law of the real estate, was because the real estate constituted no part of the assets under administration: *Nichols v. Day*, 32 N. H. 138; 64 Am. Dec. 358.

But here, in this state, every particle of property whereof a party dies seised, or possessed (with certain exceptions not necessary to be noted now) whether real, personal, or mixed, constitutes the assets of the estate, and has to be inventoried and sold as such whenever occasion demands, and therefore, the reason of the rule existing at common law already mentioned, no longer exists, and *cessat ratio cessat ipsa lex*.

As is well said in *Faran v. Robinson*, 17 Ohio St. 242, 93 Am. Dec. 617 (cited approvingly by Burgess, J., in *Rogers v. Johnson*, 125 Mo. 216): "Under our laws, the real estate of a deceased person, subject to the widow's right of dower, is, in the last resort, as much and as truly assets in the hands of his personal representatives for the payment of debts as his personal property is."

⁴⁹¹ And, consequently, a judgment which establishes a debt against an estate, no matter out of what assets it must ultimately be paid, should be as conclusive on the heir as on the administrator, and we hold that it is as conclusive.

And in this state it is to be noted, also, that no judgment is rendered against an administrator when a claim is allowed. The judgment of allowance and classification is rendered against the estate. It is, in all of its essential incidents and consequences, a judgment in rem (1 *Woerner's American Law of Administration*, 337, 338; 2 *Woerner's American Law of Administration*, 1030), which, like other judgments in rem, in similar circumstances, is binding on the whole world, and, because of this also, the same consequences cannot follow such impersonal judgment as would follow at common law a judgment *de bonis testatoris*.

Again, among the reasons mentioned in the authorities cited on behalf of defendants is, that a judgment should not bind a person not a party to the suit, who cannot offer testimony, adduce evidence in opposition to the claim, nor appeal from the judgment. None of these reasons has any force in the case at bar, because the legislature has made ample provision for this class of cases as follows, to wit: "If any executor, administrator, heir, or creditor of an estate shall, within four months after any demand shall have been allowed, file in the office of the probate court the

affidavit of himself or some credible person, stating that the affiant has good reason to believe, and does believe, that such demand has been improperly allowed, the court shall vacate such order of allowance and try the matter anew, and allow or reject such demand as shall be right; and if, upon such new hearing, such demand shall be allowed, it shall be classed and paid as if such new hearing had not been granted": Rev. Stats. 1889, sec. 213. Under the statute as it stood formerly ⁴⁹² (Rev. Stats. 1879, sec. 216), only an executor or administrator was allowed to file such an affidavit.

Section 285 of the Revised Statutes of 1889, makes provision for appeals from the probate court to the circuit court in a large number of cases, and winds up by saying: "And in all other cases where there shall be a final decision of any matter arising under the provisions of this chapter. *And the right of appeal herein provided for shall extend to any heir, devisee, legatee, creditor, or other person having an interest in the estate under administration." This is a new clause added to the above section from the asterisk downward, and first appeared in the statutes of 1889. Subsequent sections provide that, on such appeal being taken, there should be a trial de novo.

It thus appears very clearly that the legislature intended that a judgment of allowance entered by a probate court should possess the same conclusive force as the judgments of other tribunals, and this has always been the doctrine of this court respecting such judgments of probate courts.

Heirs, having the right of setting aside an order of allowance, and then having done so, having the right of a trial anew, and having also the right of appeal whether they move to set aside or not, they evidently do not fall within the reason of the doctrine announced in the authorities cited for defendants. Of course, there might be cases of fraud or collusion, in the very procurement of an allowance, and, in such cases, doubtless the power of a court of equity could successfully be invoked, but no such case is here made by the pleadings.

As to the description of the land, it is admitted to be correct in the answer, and on the trial it was stipulated between the parties that the three thousand nine hundred dollar note described in the petition was given for the balance of the purchase money from S. E. Peyton, deceased, for the real ⁴⁹³ estate sought to be charged in the petition with the vendor's lien. In such circumstances, it is not seen how, in the face of their answer and stipulation, defendants could claim that plaintiffs were attempt-

ing to charge with a vendor's lien land which was not sold to Mrs. Peyton. And it is not apparent, inasmuch as plaintiffs do not seek a personal judgment against defendants, and inasmuch, also, as the estate of Mrs. Peyton is hopelessly insolvent, what concern defendants can possibly have whether plaintiffs seek to enforce their lien on the right land or not, or whether they embraced all of the land in the suit to enforce their lien.

It is unnecessary to notice other points assigned for error. Decree affirmed.

All concur.

EXECUTORS AND ADMINISTRATORS — JUDGMENTS AGAINST—CONCLUSIVENESS.—Unless there is fraud or collusion between an administrator and a creditor of an estate, a judgment regularly rendered in a court of competent jurisdiction, in favor of the creditor and against the administrator, is conclusive as to all matters adjudicated thereby upon legatees and all other creditors of the estate: *Morris v. Murphey*, 95 Ga. 307; 51 Am. St. Rep. 81, and note.

JUDGMENTS—IMPEACHING FOR FRAUD.—It is only for fraud, intrinsic or collateral to the matter in issue and tried in an action, that a court of equity will set aside or annul a judgment for fraud: *Fealey v. Fealey*, 104 Cal. 354; 43 Am. St. Rep. 111, and note. See, also, *Hollinger v. Reeme*, 138 Ind. 363; 46 Am. St. Rep. 402, and note.

COURTS OF PROBATE—JUDGMENTS—CONCLUSIVENESS OF.—The decree of the orphan's court as to every point necessary to be decided upon is conclusive: *Merrill v. Harris*, 26 N. H. 142; 57 Am. Dec. 359, and note; *Roderigas v. East River Inst.*, 63 N. Y. 460; 20 Am. Rep. 555. See, also, extended note to *McPherson v. Cunliff*, 14 Am. Dec. 663-665. The orders and judgments of probate courts, when acting within their jurisdiction, are entitled to the same favorable presumptions and the same immunity from collateral attack as are accorded those of courts of general jurisdiction: *Sherwood v. Baker*, 105 Mo. 472; 24 Am. St. Rep. 399, and note.

REED v. WESTERN UNION TELEGRAPH COMPANY.

[135 MISSOURI, 661.]

TELEGRAPH COMPANIES CANNOT BY CONTRACT EXEMPT THEMSELVES from liability for their negligence, either ordinary or gross, or that of their servants, in the transmission of messages.

TELEGRAPH COMPANIES MUST PROVIDE COMPETENT SERVANTS and suitable instruments and respond in damages for their negligence or the negligence of their servants.

TELEGRAPH COMPANIES—NEGLIGENCE—BURDEN OF PROOF.—Proof that a telegraphic message was not transmitted as it was delivered to the company, and that it was acted upon as received by the sendee, establishes a prima facie case of negligence against the company, and casts the burden of proof upon it to disprove such negligence.

TELEGRAPH COMPANIES—CONFLICT OF LAWS.—If a telegraphic message is delivered to the company in one state, to be

by it transmitted to a place in another state, the validity and interpretation of its contract, as well as its liability thereunder, is to be determined by the law of the former state.

TELEGRAPH COMPANIES—NEGLIGENCE—MEASURE OF DAMAGES.—If a land agent leaves a message with a telegraph company directed to his principal and naming the price at which his property can be sold, and the company, through error in the transmission of the message, raises the price named therein, and the principal accepts the offer as received, and executes a deed at that price, while the agent is compelled to conclude the contract of sale at the price first named by him, the telegraph company is liable to the vendor for the difference in price as named in the message as received by it and the raised price as named in the message as delivered to the vendor.

APPELLATE PRACTICE—INTEREST.—If the right to recover interest is conceded by both parties upon the trial, the allowance thereof cannot be assigned as error on appeal.

Karnes, Holmes & Krauthoff, for the appellant.

Kagy & Bremermann, for the respondent.

GANTT, P. J. This action is by a sendee or addressee of a commercial telegram against the telegraph company for negligence in its transmission, whereby the plaintiff or sendee was misled into authorizing her agent to conclude a contract of sale of a tract of land for thirteen hundred dollars, when she believed she was obtaining nineteen hundred dollars therefor.

Plaintiff's agent, Hedges, living in Cedar Rapids, Iowa, where her real estate was situated, delivered to ^{see} the defendant telegraph company, to be transmitted to plaintiff living in Kansas City, Missouri, the following message:

"Cedar Rapids, Iowa, May 25, 1889.

"James A. Reed, 306 Nelson Building, Kansas City, Mo.

"Offered thirteen hundred cash, lot two houses near planing mill. Must hear immediately. Can't get more.

"GEORGE T. HEDGES."

The regular tariff rate was paid by Hedges.

This message when delivered was as follows:

"Cedar Rapids, Iowa, May 25, 1889.

"James A. Reed, 306 Nelson Building, Kansas City, Mo.

"Offered nineteen hundred cash, lot two houses near planing mill. Must hear immediately. Can't get more.

"GEORGE T. HEDGES."

It will be noted the offer was changed in transmission from thirteen hundred to nineteen hundred dollars.

After requesting the operator and agent of defendant at Kansas City to verify the message on account of its importance, and having been informed by the operator that he had verified it and

she could rely upon it, plaintiff, ignorant of the error in the message received, on the same day, sent Hedges this telegram:

"Sell property for amount offered. Will send deed by Monday, 27th."

Armed with this power of attorney, Hedges, the agent, also ignorant of the mistake in his message to plaintiff, and supposing he was authorized to sell the lot for thirteen hundred dollars, received a part payment of the purchaser thereon and gave a written memorandum of the sale, agreeing to make the deed and deliver possession. On the 27th of May, 1889, plaintiff and her husband joined in the execution of a deed to the purchaser reciting a consideration of nineteen hundred dollars, and forwarded it to ⁶⁶⁷ Hedges, who received it on the 29th. When Hedges received the deed, he thought possibly there was a mistake owing to the insertion of nineteen hundred dollars instead of thirteen hundred dollars, and suggested to the purchaser that they wait until he could write plaintiff, but the purchaser threatening a suit, he delivered the deed and accepted thirteen hundred dollars, which he remitted to plaintiff, less his commission. Upon receiving the letter and being apprised for the first time of the mistake, plaintiff, Mrs. Reed, at once, and within the sixty days limited therefor, made claim for six hundred dollars damages, which, being refused by defendant, she commenced this action.

Defendant offered no evidence whatever to account for the mistake in the transmission of the message. The company relies upon various alleged errors to reverse the judgment recovered by plaintiff.

1. It is earnestly insisted by defendant that its liability is limited by the following stipulation made by it with plaintiff's agent when it received and undertook to transmit the message: "All messages taken by this company are subject to the following terms: To guard against mistakes or delays, the sender of a message should order it repeated; that is, telegraphed back to the originating office for comparison. For this, one-half the regular rate is charged in addition. It is agreed between the sender of the following message and this company that said company shall not be liable for mistakes or delays in the transmission or delivery or for nondelivery of any unrepeated message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same."

It is agreed that this was an unrepeated message. The position of defendant is, that the stipulation limiting its liability for

errors and mistakes in the transmission of said message is valid. It goes further ⁶⁰⁵ and asserts it is not even liable for the negligence of its operators in the transmission of said message; that it is only liable upon an averment and proof of gross negligence, and it is supported by most eminent authority in said claim: *Primrose v. Western Union Tel. Co.* (1894), 154 U. S. 1; *Kiley v. Western Union Tel. Co.*, 109 N. Y. 231; *Western Union Tel. Co. v. Stevenson*, 128 Pa. St. 442; 15 Am. St. Rep. 687, and many other cases. Moreover, such is the latest authoritative statement of the law on this subject by this court: *Wann v. Western Union Tel. Co.*, 37 Mo. 472; 90 Am. Dec. 395.

At the threshold, then, the question arises, Shall this court adhere to the ruling in the *Wann* case? The reasoning of that case, which was the first in which this court was called upon to construe the statute of 1855, sections 5 and 6, page 1521, was that the transmission of messages by electricity was so seriously affected by atmospheric causes which were uncontrollable that it would be ruinous to deny telegraph companies the right to limit their liability to any extent short of gross negligence. In other words, if that decision is to stand, it simply means that in this state telegraph companies are not liable for negligence because all their messages are sent subject to this same stipulation exempting them from all liability for the negligence of their servants in transmitting messages.

Ought such a precedent to be longer followed? Is it not contrary to a sound public policy which denies to common carriers and other agencies which conduct a public, as contradistinguished from a private, business, the right to stipulate against their own negligence? We unhesitatingly answer in the affirmative. Loth as we are to overrule a decision that has stood so long, we are convinced it cannot be longer maintained on principle. It was rendered when the system of telegraphic communication was yet in a crude state. The difficulties which then appeared to the courts to be so serious ⁶⁰⁹ have largely vanished. The art of telegraphy in the thirty years that have since intervened has been reduced to comparative exactness, and when, as in this case, there is no evidence whatever of atmospheric disturbances or unfavorable conditions, it is very plain that an error by which thirteen is distorted into nineteen is caused either by careless operators or imperfect and insufficient instruments and appliances. Since that decision was made, the relation of the telegraph to the commercial and social intercourse of the world has excited the most thorough and critical discussion, and, as might be expected, many

contrary views have been expressed and many conflicting adjudications rendered.

It is because the reasons which induced the decision in the Wann case do not, in our opinion, any longer obtain that we are constrained to reverse that decision. It cannot be maintained that the same degree of responsibility should attach to persons or corporations engaged in transmitting intelligence by a system which was as yet crude, their operators untrained, and its appliances only experimental, and a system which, after fifty years of experience with all the adventitious aids of modern science, has been perfected in all its parts, both as to suitable instruments and the opportunity afforded to employ expert and experienced operators. While it was anticipated that this new method of communication would revolutionize old methods, no one thirty years ago could have predicted how essential and indispensable the telegraph would become to the commercial and social interests of the whole world. It occupies a unique and peculiar place, and all analogies to former agencies fail when we come to apply rules of liability.

Thus at first they were called and adjudged to be common carriers, but criticisms of this title brought about a complete abandonment by the courts of that ^{old} appellation. Equally unfortunate was the endeavor to class them as private bailees. They are not bailees in any proper legal sense. What, then, is their legal attitude? When this question is correctly answered, just legal principles can be applied.

They are corporations created for public benefit, endowed with special privileges, such as the right of eminent domain, and perform the most important functions of commerce, supplanting, in cases where celerity and rapid transmission of intelligence is necessary, the postal service of the government. Their business intimately concerns the public, and, on this account, the government assumes and has the right to regulate their business so as to insure impartiality of service and prevent the exaction of unreasonable tolls. Many and varied interests are dependent upon them. From their exceptional position it is in their power, by a corrupt use of their knowledge and information, to reap unconscionable advantages in the marts of trade, or, by their negligence, entail ruin and disaster upon individuals and communities. Having these exceptional advantages and enjoying a practical monopoly, every reason exists why they should be held to a rigid accountability for the negligence of their servants and employes.

Without rendering them liable as insurers or holding them for the action of the elements over which they have no control, sound judicial reasoning does demand that they should be required to perform their duties in a careful and diligent manner, and that they should respond for the negligence of their servants. Why not? Such a rule entails no hardship. It is less onerous than that exacted of common carriers of goods, and no greater than is required of carriers of passengers to whose care is committed the lives and limbs of the public. Their duty springs not alone, as a private ⁶⁷¹ bailee's does, from contract, but is the result of the character of their business and the laws regulating them. They voluntarily engage in the business; they solicit and receive the confidence of the public, and their occupation requires small outlay compared to the profits realized. Having undertaken to transmit the message, why should they not be held to a careful performance of that duty and be liable for a negligent disregard thereof. Why should they be permitted to demand an extra half toll for the faithful performance of a duty for which they have already charged a reasonable price? They have absolute control of their employes, select their own instruments, own their own wires, and invariably demand payment in advance.

Notwithstanding our respect for the learned courts which have held they are not liable for negligence, we cannot concur in that view. In the language of the supreme court of Tennessee in *Marr v. Western Union Tel. Co.*, 85 Tenn. 545, we hold that this stipulation constitutes "but an artful arrangement and device by which the consequences of their own negligence is thrown upon the shoulders of their customers, and they are [thus] enabled to conduct business with no responsibility beyond that of the most trivial character for their own want of due care."

We hold it utterly unreasonable and contrary to all the analogies of the law and sound public policy to allow such companies to thus stipulate against liability for mistakes caused by their own negligence.

Moreover, we hold that the distinction between negligence and gross negligence contended for by defendant does not exist in this state. It was pointed out by the learned judge who wrote the *Wann* case, in the subsequent case of *McPheeters v. Hannibal etc. R. R. Co.*, 45 Mo. 22, that "there is no difference between negligence and gross negligence, the latter being nothing more than ⁶⁷² the former, with the addition of a vituperative epithet": *Grill v. Collier Co.*, 35 L. J. Com. P., N. S., 321; *Lemon v. Chanslor*, 68 Mo. 358; 30 Am. Rep. 799; *Wilson v. Brett*, 11

Mees. & W. 113; Hinton v. Dibbin, 2 Q. B. 646; Milwaukee etc. R. R. Co. v. Arms, 91 U. S. 494; Beven on Negligence, 43; Gray on Communication by Telegraph, 66; Telegraph Co. v. Griswold, 37 Ohio St. 301; 41 Am. Rep. 500.

Many of the courts of this country adopted the view pronounced in the Wann case in the earlier stages of the discussion, but the tendency of judicial decision at present is, that these companies should be held to the exercise of ordinary care, that is to say, they are bound to have suitable instruments and competent servants, and see that the service rendered to their patrons is performed with the care and skill requisite to their peculiar undertaking. Their reasons for so holding are entirely satisfactory to us: Ayer v. Western Union Tel. Co., 79 Me. 493; 1 Am. St. Rep. 353; Tyler v. Western Union Tel. Co., 60 Ill. 421; 14 Am. Rep. 38; Telegraph Co. v. Griswold, 37 Ohio St. 301; 41 Am. Rep. 500; Western Union Tel. Co. v. Crall, 38 Kan. 679; 5 Am. St. Rep. 795; Western Union Tel. Co. v. Howell, 38 Kan. 685; Bigelow's Cases on Torts, 602; Western Union Tel. Co. v. Allen, 66 Miss. 544; Marr v. Western Union Tel. Co., 85 Tenn. 529; Sweatland v. Illinois etc. Tel. Co., 27 Iowa, 433; 1 Am. Rep. 285; Harkness v. Western Union Tel. Co., 73 Iowa, 190; 5 Am. St. Rep. 672.

In Sweatland v. Illinois etc. Tel. Co., 27 Iowa, 433, 1 Am. Rep. 285, Judge Dillon criticises the Wann case in these words: "There is a dictum in McAndrews case (1835), 17 Com. B. 3—the first case which arose—to the effect that by regulations the companies may protect themselves from liability for mistakes in unrepeatd messages, except those caused by their gross negligence, and this expression has been incautiously copied and used arguendo by other courts, as for instance in Wann v. Western Union Tel. Co., 37 Mo. 472; 90 Am. Dec. 395."

The McAndrew case was an English case and based ^{on} upon the English doctrine that a common carrier may contract against his own negligence, a doctrine repudiated by all American courts except perhaps New York: See, also, Western Union Tel. Co. v. Fontaine, 58 Ga. 433; Western Union Tel. Co. v. Blanchard, 68 Ga. 299; 45 Am. Rep. 480; Western Union Tel. Co. v. Cohen, 73 Ga. 522; Gillis v. Western Union Tel. Co. (1889), 61 Vt. 461; 15 Am. St. Rep. 917; Thompson v. Western Union Tel. Co., 64 Wis. 531; 54 Am. Rep. 644; Western Union Tel. Co. v. Short, 53 Ark. 434.

Because we think that both reason and the weight of authority are against the decision in the Wann case, and as no rule of property is involved, that case is overruled.

2. Having reached the conclusion that the defendant was bound to exercise ordinary care in transmitting the message to plaintiffs, the next inquiry arises, Was there sufficient evidence to justify the verdict? Did plaintiffs establish a *prima facie* case?

It was established beyond peradventure that the message was not transmitted as it was delivered to defendant; that plaintiffs acted upon it as received by them. When this was shown, a *prima facie* case of negligence was established, and the burden of disproving the negligence was cast upon defendant, and it made no explanation whatever: *Western Union Tel. Co. v. Blanchard*, 68 Ga. 299; 45 Am. Rep. 480; *Gray on Communication by Telegraph*, sec. 77, and authorities cited; *Tyler v. Western Union Tel. Co.*, 60 Ill. 421; 14 Am. Rep. 38; *Smith v. Western Union Tel. Co.*, 57 Mo. App. 259; *Telegraph Co. v. Griswold*, 37 Ohio St. 301-313; 41 Am. Rep. 500; *Bartlett v. Western Union Tel. Co.*, 62 Me. 209; 16 Am. Rep. 437; *Western Union Tel. Co. v. Carew*, 15 Mich. 525.

3. There was no error in admitting in evidence section 1329 of the statutes of Iowa, which provides that "the proprietor of a telegraph is liable for all mistakes in transmitting messages made by any person in his employment and for all damages resulting from a failure to perform any of the duties required by law,"⁶⁷⁴ and the testimony of Judge E. H. Stiles, who for many years was the official reporter of the decisions of the supreme court of Iowa, and who was first qualified as being familiar with the unwritten law of Iowa. The objection was simply that it was incompetent, irrelevant, and immaterial, and the message was not governed by the laws of that state.

The contract was made in Iowa, and, according to its terms, it was to be partially performed in that state. Indeed, it is quite evident that its breach occurred in that state. Does the circumstance that it was to be partially performed in Missouri exempt it from the laws of Iowa? We think most clearly not. Like a contract of affreightment, its validity and interpretation ordinarily is to be governed by the law of the state in which it was made. The statute of Iowa in no sense attempts to regulate interstate communication by telegram. Both parties to this agreement for the transmission of the message resided in Iowa. The tariff was paid, and defendant entered upon the performance of the contract in that state. The statute and laws of Iowa were therefore pertinent and admissible, and determined the effect of

said contract: *McDaniel v. Chicago etc. Ry. Co.*, 24 Iowa, 416; *Liverpool etc. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 457.

4. But it is urged that even if defendant is liable for negligence under the circumstances, still the loss of the difference between the price received and the actual market value of the lot is not the proximate result of that negligence—in other words, is not the natural and reasonable consequence of defendant's mistake; and the principle is invoked that no one can recover damages which he can avoid by diligent effort upon his own part.

Let us examine this view of the case. This message was not in cipher. The defendant was fully advised ⁶⁷⁵ of its importance on the face of the message, and, after being so advised, its agent assured plaintiff that it had been repeated and she could rely upon its correctness. In this way plaintiff was led to believe she was offered nineteen hundred dollars for her property. Being willing to part with it for that sum, she wired acceptance of the proposition made. The proposal was only thirteen hundred dollars, but in this way she was made to accept that proposal. Her agent was clothed not only with apparent, but actual, authority to sell for thirteen hundred dollars, so far as he was advised. Being thus empowered to sell, he made a binding contract and accepted a part of the purchase money. The deed was forwarded, and he delivered it. All this was done upon reliance on the correctness of defendant's action. Could a more natural consequence ever follow a transaction than this loss did upon the mistake of defendant? Does it lie in defendant's mouth to speculate how plaintiff or her agent, by the exercise of care which it failed to exercise, might have avoided her contract with the purchaser? Has the defendant the right to require plaintiff to enter upon a long and doubtful litigation to rescind the contract which was fully executed by delivery of her deed and the receipt of the purchase money? We most clearly think not.

The cases cited by learned counsel do not meet this case. Here the damages are the direct result of defendant's negligence. Moreover, they had fully accrued when plaintiff discovered the mistake. There was no means of avoiding them, except to sue the blameless purchaser or the negligent company. She chose the latter course, and we think properly.

Plaintiff's agent received her instructions by means of defendant's wire, and acted in good faith, and it would seem he ought not be mulcted in damages for so doing.

⁶⁷⁶ The purchaser dealt not by means of the telegraph, but directly with the agent apparently clothed with full power to

sell. His vendor had selected the telegraph as the means of communication, and, as between vendor and vendee, the vendor should bear the loss occasioned by that means, in the absence of any evidence of fraud or knowledge of error on part of the vendee.

In this case, the question does not arise as to whether plaintiff was bound by the acts of the telegraph company as her agent. She was bound by the act of her own agent, who entered into a binding contract in her name with the vendee. We think the proper measure of damages under the circumstances was the difference between the actual market value of the lot and the price received by the mistake occasioned by defendant's negligence.

5. As to interest, as it was conceded on the trial that interest was recoverable, and defendant's counsel named the amount at one hundred dollars, it is clearly no ground for reversing the case. While the jury might or might not give it, when both parties act upon the presumption that if a recovery is justifiable, interest should follow, it presents no ground of substantial error.

The judgment is affirmed.

Sherwood and Burgess, JJ., concur.

TELEGRAPH COMPANIES—POWER TO LIMIT LIABILITY BY CONTRACT.—The rule that no one can provide by contract against liability for negligence in any degree applies as well to telegraph companies as to other corporations and persons: *Brown v. Postal Tel. Co.*, 111 N. C. 187; 32 Am. St. Rep. 793, and note; *Birkett v. Western Union Tel. Co.*, 103 Mich. 361; 50 Am. St. Rep. 374, and note.

TELEGRAPH COMPANIES—MISTAKE IN TRANSMITTING MESSAGE—BURDEN OF PROOF.—Where no testimony is introduced by the defendant company, the mere production of the message containing the mistakes is sufficient to establish gross carelessness by the company, and throws upon it the burden of proof to excuse or explain its mistakes: *Western Union Tel. Co. v. Crall*, 38 Kan. 679; 5 Am. St. Rep. 795, and note; *Fowler v. Western Union Tel. Co.*, 80 Me. 381; 6 Am. St. Rep. 211.

TELEGRAPH COMPANIES—MISTAKES IN TRANSMISSION OF MESSAGE—MEASURE OF DAMAGES.—Telegraph companies are liable for actual damages received through their negligent mistakes or errors in sending or transcribing messages: *Western Union Tel. Co. v. Rountree*, 92 Ga. 611; 44 Am. St. Rep. 98, and note. See, also, *Shingleur v. Western Union Tel. Co.*, 72 Miss. 1030; 48 Am. St. Rep. 604, and note; monographic note to *Western Union Tel. Co. v. Cooper*, 10 Am. St. Rep. 778-790.

APPEAL.—A QUESTION NOT RAISED AT THE TRIAL will not be considered for the first time on appeal: *Reich v. Cochran*, 151 N. Y. 122; 56 Am. St. Rep. 607, and note.

CONFLICT OF LAWS—PLACE OF CONTRACT.—The place of the contract regulates its validity, interpretation, and the nature of the obligation: *Schultz v. Howard*, 63 Minn. 196; 56 Am. St. Rep. 470, and note.

BRAMELL v. COLE.

[136 MISSOURI, 201.]

PROBATE COURTS—JURISDICTION TO DECLARE TRUSTS.—Probate courts have jurisdiction to order the distribution of the funds belonging to the estates of deceased persons, and for that purpose to determine who are entitled to receive them; and such orders are conclusive on all persons over whom jurisdiction has been acquired. Such courts have no jurisdiction to declare trusts in the estates distributed, or to follow up a trust fund, or to impose conditions or limitations upon its use and disposition.

PROBATE COURTS—JURISDICTION UNDER WILLS.—A probate court has no jurisdiction in distributing an estate, as against those claiming the remainder, whether the legatee under a will takes an absolute or a limited right.

WILLS—CONSTRUCTION—LIFE ESTATE—POWER OF DISPOSITION.—If a life estate is expressly given by will, a power of absolute disposition is not to be implied from the fact that the devise or bequest over is of what remains at the death of the first taker, when it also appears that the property may be diminished in the hands of the life tenant by the uses to which it may properly be applied.

WILLS—CONSTRUCTION—LIFE ESTATE—POWER OF DISPOSITION.—If a will devising a life estate to a devisee directs that he shall have "full control" of property during life, and that "what is left" is to go to named remaindermen, the life tenant has no power to dispose of the estate, as the word "control" simply implies a power to invest and reinvest, but does not imply a power to dispose of the estate itself so as to defeat the rights of those entitled to its future use. It implies such powers as are usually conferred upon trustees of express trusts.

LIFE ESTATES—RIGHT TO INCOME.—One holding a life estate is not entitled to the income therefrom if a different intention clearly appears from the will or other instrument creating such estate.

E. A. Nickerson and O. L. Houts, for the appellant.

A. B. Logan and J. Parks & Son, for the respondents.

205 MACFARLANE, J. Calvin Atkins resided in Moniteau county, and died there in March, 1884, leaving a will as follows:

"First. I will that all my just debts be paid at as early a day as practicable, and the remainder that is left to go to my beloved wife, Margaret A. Atkins, during her natural lifetime; she to have the entire control of the same, it consisting of the following real estate: The west half of the northeast quarter of section No. 23 (twenty-three), in township 44 (forty-four) north, of range 2 (two) west, containing eighty acres, more or less; it being the same that we now reside upon, and all other lands that I may have any claim to and upon, ²⁰⁶ in any wise, and also all moneys, cash, notes, or bonds, and evidence of debts of every description whatsoever, and also all my personal property and effects of

all description and effects of all kinds, to go to her, for her to have full control of the same as long as she lives, and that after her death, what is left to go to A. W. Cole and Louisa Bramell and her children, legal heirs of her body, share and share alike, that is to say, the said A. W. Cole and Louisa Bramell, wife of Washington Bramell, is to share equal to any one of the children of the said Washington and Louisa Bramell and no more; and I further revoke all former wills of every description whatsoever, and publish this as my last will and testament. And my will is that my beloved wife, Margaret A. Atkins, shall act as my executor of my entire estate both real and personal of every description whatsoever.

"Signed, dated, and delivered this August 21st day, A. D. 1866."

In the month of March, 1884, in the probate court of Moniteau county, Missouri, the will was probated, and Margaret A. Atkins, the widow of deceased, was appointed and qualified as executrix, and took charge of the estate of her deceased husband, Calvin Atkins. On April 8, 1884, she filed an inventory of the estate, showing the aggregate assets thereof to be fifty-four thousand seven hundred and eighty dollars and fifty-two cents, consisting exclusively of promissory notes. After making an annual settlement, on the fifteenth day of April, 1886, she gave notice of final settlement according to law and in pursuance therewith, on the tenth day of May, 1886, she made proof of publication and presented her settlement to the said probate court, showing a balance due the estate of thirty-nine thousand two hundred and ten dollars and fifty-nine cents. On the same day, the court approved the settlement and made this order:

207 "Estate of Calvin Atkins, deceased.—Now at this day it is ordered by the court that Margaret A. Atkins, executrix of said estate and widow of said deceased, and sole legatee in the will of said Calvin Atkins, retain as her interest under said will all the money, notes, accounts, and choses in action remaining in her hands on final settlement of said estate."

In pursuance of this order, Mrs. Atkins took possession of the balance of the estate and used it until her death. With a portion of it, and of the interest and accumulations thereon during the years 1887 and 1889, she purchased the lands in question. Mrs. Atkins died February 8, 1892, leaving as her sole heirs at law defendant Alstorfus W. Cole, and plaintiff Louisa Bramell. These heirs, I understand, were children by a former husband.

During her life Mrs. Atkins conveyed to certain children of

Louisa Bramell, respectively, portions of said real estate, and retained the title and possession of the remainder, consisting of several hundred acres, until her death. These conveyances, we understand, were without valuable consideration.

Some time after the death of Mrs. Atkins, this suit was commenced by Louisa Bramell and certain of her children by Washington Bramell, against defendant Cole and certain other children of said Louisa and Washington Bramell, who were minors.

The petition states the foregoing facts, and charges that, under the provisions of the will, Mrs. Atkins received this balance as trustee for plaintiffs and defendants, subject only to her control during her natural life and to her reasonable support and maintenance out of the income and profits thereof. It further charges that the real estate before mentioned was purchased by Mrs. Atkins with a portion of this fund, and that the defendant Cole and plaintiff Louisa Bramell, ²⁰⁸ as sole heirs of Mrs. Atkins, hold the legal title to this land in trust for the plaintiffs and defendants. It then asks the court to declare the trust as charged.

Defendant A. W. Cole answered separately. He admitted the facts as hereinbefore set out and the relation of the parties, plaintiff and defendant, as set out in the petition, and denied the other allegations of the petition. He set up the approval of the final settlement and order of distribution of the probate court of Moniteau county, Missouri, as a former adjudication of all the questions and issues involved in this suit, charged that it concluded the parties herein, and that under the said order he and Louisa Bramell, as sole heirs of Margaret A. Atkins, deceased, were the owners of the lands in question, and, as such, entitled to partition, each to receive one-half thereof, and for which he prayed judgment.

He further claimed in his answer that Margaret A. Atkins, under the terms and provisions of the will, had full power of disposition of all the property of said Calvin Atkins by him devised, and the right to invest the same in lands or in any manner she saw proper, with full power of disposition over the same during her lifetime. He also claimed and set up in his answer that, under the terms of the will, the increase, interest, and accumulations produced from the fund over and above the amount that came into her hands on final settlement became her absolute property as life tenant, and belonged and descended to her legal representatives and heirs, her administrator, himself, and the said Louisa Bramell, and not to the distributees under the will.

On the trial, there was no substantial controversy over the facts. The court found all the facts as charged in the petition, and decreed that the title of all said land was held by the heirs and grantees of Atkins in trust ²⁰⁹ for the use of the devisees under said will, namely, A. W. Cole, Louisa Bramell, and the children of said Louisa and Washington Bramell, naming them. From the judgment A. W. Cole appealed.

1. The issues involve the construction of the will of Calvin Atkins, deceased. Appellant, however, insists in the first place, that, whatever may be the proper construction of the will, the order of distribution made by the probate court of Moniteau county was conclusive upon the parties and adjudicated all the issues involved in this suit.

That the will in question only gave, in terms, to Margaret A. Atkins a life estate in the property of which the testator died possessed is conceded by appellant.

The order of the probate court, made upon final settlement, is "that Margaret A. Atkins, executrix of said estate, and widow of said deceased, and sole legatee in the will of said Calvin Atkins, retain as her interest under said will all the money, notes, accounts, and choses in action remaining in her hands in the final settlement of said estate."

Probate courts are given jurisdiction over the estates of deceased persons, and have power to pass upon final settlements of executors and administrators, and to order the distribution of the assets remaining undisposed of on final settlement to those entitled thereto, whether they claim as heirs of an intestate, or as legatees under the will of a testator. An order of distribution will, therefore, be conclusive on all parties who are properly before the court, upon all questions necessarily involved therein: *In re Estate of Elliott*, 98 Mo. 379; *Redman v. Barger*, 118 Mo. 568; *Young v. Byrd*, 124 Mo. 596; 46 Am. St. Rep. 461.

But probate courts, under the laws of this state, are limited, in their powers and jurisdiction, to such ²¹⁰ matters as are expressly conferred upon them by the statute, and such as are necessarily incident to the duties imposed. They are given power to order the distribution of the funds belonging to estates of deceased persons, and for that purpose to determine who are entitled to receive it, and orders so made will conclude all persons over whom they have acquired jurisdiction, by notice or otherwise. But the question of the future use of the fund by the distributees is not involved. No power is given such courts, in express terms or by implication, to declare trusts in the estate

distributed, or to follow up the trust fund, or to impose conditions or limitations upon its use and disposition. These powers belong exclusively to courts of equity.

The probate court of Moniteau county had the power to determine, as it did, to whom the funds in the hands of the executor should be paid. It had no right to determine, as against those claiming the remainder, whether the legatee under the will took an absolute or limited right, and its judgment on that question was not binding upon such claimants, though they may have been before the court. Indeed, the order cannot be properly construed as attempting to determine the future rights of the parties.

2. There can be no doubt of the intention of the testator to limit whatever estate he gave his wife, Margaret A. Atkins, to her life. This intention is clearly and unequivocally expressed in the opening lines of the will wherein he declares: "I will that all my just debts be paid at as early a day as practical, and the remainder that is left to go to my beloved wife, Margaret A. Atkins, during her natural lifetime." "The remainder that is left" refers to the property left after payment of debts, for he adds "she to have entire control of the same." The testator then describes the property in the most comprehensive terms, and ²¹¹ adds: "To go to her, for her to have the full control of the same, as long as she lives."

Appellant insists that, though a life estate was given Mrs. Atkins in express terms, yet she was also given the absolute and unlimited right to dispose of the property, by which the life estate was converted into an absolute ownership; and that appellant, as an heir of Mrs. Atkins, took by inheritance from her. The circuit court held otherwise, and this ruling constituted the second and principal assignment of error. It is not, and, indeed cannot be, claimed that a power of disposition is expressly given, but, appellant insists, that the intention to grant such right is necessarily implied from the language used by the testator.

It is needless to say that an intention clearly expressed in a will should not be defeated, except by some inflexible rule of law or public policy, unless a wholly inconsistent intention is manifest upon reading the entire instrument. This is particularly true when the inconsistency is raised by implication only. The implication, to have such an effect, should be very conclusive.

Appellant insists that the intention of the testator to grant his wife the right to dispose of the property bequeathed is necessarily implied from the facts that she is given entire control of

the property during her life, and that only what is left of it, at her death, is limited over.

In determining the intention of a testator to grant to a tenant for life the power to dispose of the property devised or bequeathed, much weight has been given to the use of words by which the limitation over is confined to what estate remains upon the death of the first taker. Such intention has been held to conclusively appear in case the property devised could only be diminished by a disposition of it by the one to whom ²¹² the life estate is given. Such declarations are held to be inconsistent with a supposition that the whole property was to remain undiminished in the hands of the first taker: *Harris v. Knapp*, 21 Pick. 416.

I take the rule in this state to be well settled that, in case a life estate is expressly given, a power of absolute disposition will not be implied from the fact that the devise or bequest over is of what remains, or what is left of the property, at the death of the first taker, wherever it appears also that the property may be diminished in the hands of the life tenant by the uses to which it may properly be applied. The use of such words only contemplates that some of the property may not exist at the death of the first devisee.

In *Gregory v. Cowgill*, 19 Mo. 417, the devise, consisting of real and personal property, was to the wife of the testator for life. To his nephew he devised all that might "remain" of his estate, both real and personal, after the death of his wife. The devisee for life sold a tract of the land. After her death the heir of the nephew sued to recover it from the grantee. The court, by Scott, J., says: "If the word 'remain' was even sufficient to raise a power of disposition in the devisees for life, there were words in the will enough to give it an effect, without applying it to the real estate. Some of the property was of a perishable nature, and some of it would be consumed in the use; it was not, therefore, designed that such portions of it should be accounted for to the remainderman." The rule announced in this case has been followed and applied in subsequent cases: *Reinders v. Koppelman*, 68 Mo. 482; 30 Am. Rep. 802; *Foote v. Sanders*, 72 Mo. 616; *Munro v. Collins*, 95 Mo. 33; *Lewis v. Pitman*, 101 Mo. 281; *Schorr v. Carter*, 120 Mo. 409.

By the will in question the testator not only devised to his wife real estate, but he also bequeathed ²¹³ to her all money, cash, notes, or bonds, and evidences of debt of every description whatsoever, and also all his personal property "and effects of all kinds." Personal property and effects, being thus distinguished

from money, notes, bonds, etc., must have included such perishable property as one would have in his residence and upon the land upon which he resided, and the words "what is left," as used in the will, can apply to such personal property.

But does the language used and repeated in the will, that the devisee should have "full control" of the property during her life, strengthen the contention that a power of disposition is to be implied? We are of the opinion that it does not, but that it has rather the contrary effect.

The intention of the testator that his wife should have the control of all the property left by him is made prominent. In the most careful and judicious management of an estate like this, losses are liable to occur. By a devise over of "what is left" the testator evidently had in mind such possible losses, and did not intend that the legatee for life should be chargeable with them.

The ordinary meaning of the word "control," when asserted of a person in charge of an estate, is that he has its management. It might imply a power to invest and reinvest, but does not imply a power to dispose of the estate itself so as to defeat the rights of those entitled to its future use. It implies such powers as are usually conferred upon trustees of express trusts. A proper control might necessitate a sale, or a purchase of specific property, but either, if made, would inure to the benefit of the estate.

The intention of this testator is plain enough, and, after all, that must be our guide in construing the will. After providing for the payment of his debts, he ²¹⁴ makes these directions, "the remainder that is left to go to my beloved wife, Margaret Atkins, during her natural lifetime; she to have the entire control of the same." After describing all the kinds of property to be included, he adds, "to go to her for her to have full control of the same as long as she lives; and that after her death what is left to go to A. W. Cole and Louisa Bramell and her children."

The prominent idea of the will is, that the wife of the testator should have full control of the estate during her life. In the very few words used this idea is twice expressed. Doubtless this husband and wife had labored and planned together in the management of their business, and the husband intended that his death should not defeat their plans, but that the business should be continued by the wife without change. He intended that she should, as they had before, use as much of the estate as was necessary for her comfort and convenience, but that what was left should be preserved for the benefit of those to whom the future use was given.

3. It is next insisted that Mrs. Atkins was at least, as the life tenant, entitled absolutely to the income and profits of the fund during her life, and her administrator should account only for the corpus of it, that is, the amount she received from the estate of the testator on final settlement of his estate, and the accumulation should descend, or be distributed to her heirs.

The general rule undoubtedly is, that one holding the life estate is entitled to the income of the property held, but, if a different intention clearly appears from the will, the rule of law must give way to the intention. The rule is made absolute by statute that "all courts and others concerned in the execution of last wills shall have due regard to the directions of the will, and the true intent and meaning of the testator, in all matters ²¹⁵ brought before them": Rev. Stats., sec. 8916; *Redman v. Barger*, 118 Mo. 573.

As has been already said, the prominent object of the testator is to give his wife the control of the property during her life. As expressed in the will, it is "to go" to her "during her natural lifetime, she to have the entire control of the same." As again expressed, it is "to go to her, for her to have the full control of the same as long as she lives." She is given "entire control" and "full control." Omitting the description of the property, the intention of committing the estate to the absolute control of the wife is twice expressed in half a dozen lines of the will. She is also made executrix.

The word "control" in this connection is very comprehensive, and implies the power to invest and reinvest, and in connection with the language immediately following, "and after her death what is left to go to A. W. Cole, and Louisa Bramell and her children," it implies that her management might either make the fund remunerative to these beneficiaries, or that it might be diminished by its use, or by unfortunate investments. By the words "what is left" the testator intended to include in the bequest over the entire property which should be in the hands of the life tenant at her death, whether it had been diminished by losses or increased by profits, or whether it consisted of personal property or had been invested in real estate.

If the testator had intended to create a simple life estate, the life tenant would have been accountable for the entire corpus of the fund, and the words "what is left" would have no meaning. A mere naked life estate, such as would, without other directions or conditions, entitle the owner of it to the income and

profits, would not imply a power of absolute control, which is so emphatically given.

As hereinbefore said, the manifest intention of the testator was, that on his death, his wife should take charge of the property they had accumulated, manage and control it during her life, and, at her death, whatever there was of it should "go to" her son and daughter and the children of the latter. This is the construction given to the will by the circuit court, and its judgment is affirmed.

Brace, C. J., Barclay and Robinson, JJ., concur.

COURTS OF PROBATE—JURISDICTION—TRUSTS.—A probate court has no jurisdiction to determine whether a devise should be held in trust. Its functions are limited to inquiring and determining whether or not the instrument presented to it as the last will of the decedent was executed by him in the manner prescribed by statute, and when he was legally competent to execute it: *Graham v. Burch*, 47 Minn. 171; 28 Am. St. Rep. 339. See, also, *Smith v. Howard*, 86 Me. 203; 41 Am. St. Rep. 537, and note; *Stewart v. Lohr*, 1 Wash. 341; 22 Am. St. Rep. 150, and note.

ESTATES—LIFE ESTATE—POWER OF DISPOSITION—CONSTRUCTION OF.—If the first taker under a will is given an estate in fee or for life, coupled with an unlimited power of disposition, the fee or absolute estate vests in the first taker, and any limitation over is void. If the power is dependent upon a contingency, or definitely qualified, the estate of the first taker is limited to life, and the remainder over takes effect: *Bradley v. Carnes*, 94 Tenn. 27; 45 Am. St. Rep. 696, and note; *Mansfield v. Shelton*, 67 Conn. 390; 52 Am. St. Rep. 235, and note. See extended note to *Carpenter v. Van Olinder*, 11 Am. St. Rep. 99.

ESTATES FOR LIFE—INCOME.—The right of life tenants to the income of property devised to them is discussed in the extended note to *Braswell v. Morehead*, 57 Am. Dec. 587-590. See, also, monographic note to *Allen v. De Groodt*, 14 Am. St. Rep. 623, and *Hite v. Hite*, 28 Ky. 257; 40 Am. St. Rep. 189.

STATE v. VAN WYK.

[186 MISSOURI, 227.]

CONSTITUTIONAL LAW—SCANDALOUS PUBLICATIONS.

A statute declaring it a felony for one to engage in editing, publishing, or disseminating a paper devoted mainly to the publication of scandals, immoral conduct, or immoral assignments is not unconstitutional as impairing the freedom of speech or the liberty of the press.

APPELLATE PRACTICE—SPECIAL JUDGE—WAIVER OF OATH.—A party who waives the taking of the oath of office by a special judge cannot afterward be heard to object that such oath was not taken.

SCANDALOUS PUBLICATIONS—INDICTMENT FOR CIRCULATING.—Under a statute declaring it a felony for one to engage in editing, publishing, or disseminating a paper mainly devoted to the publication of scandals and immoral conduct, an indictment

charging that on a certain day defendant engaged in disseminating and selling a certain newspaper, naming it, and alleging that it was devoted mainly to the publications of scandals, assignations, and immoral conduct, is sufficient without setting up the contents of such paper, its date, to whom sold, and like details.

JURORS—COMPETENCY.—On a trial under an indictment for circulating a scandalous newspaper, a juror, who on his voir dire states that he has an opinion that such newspaper ought to be suppressed, but that he has no opinion as to the guilt or innocence of the defendant, that he has never read a copy of such paper, that his opinion is formed wholly from public talk, and that he can give an impartial verdict, is competent as a juror.

CONSTITUTIONAL LAW—CRUEL AND UNUSUAL PUNISHMENT.—A sentence of imprisonment in the penitentiary for two years for circulating and selling a newspaper devoted mainly to the publication of scandals and immoral conduct is not a cruel or unusual punishment, within the meaning of constitutional provisions prohibiting such punishment.

INDICTMENT—VERDICT TO SUSTAIN.—If two counts in an indictment relate to one and the same transaction, a general verdict is sufficient.

VERDICT—ASSESSMENT OF PUNISHMENT.—If a verdict finds the accused guilty of the offense charged, and assesses his punishment "at two (2) in the penitentiary," the verdict, though defective is good as a general one of guilty, and the court is authorized to fix the punishment.

H. L. Strohm, for the appellant.

R. F. Walker, attorney general, M. Jourdan, assistant attorney general, and A. B. Duncan, prosecuting attorney, for the state.

231 GANTT, P. J. The grand jury of Buchanan county preferred the following indictment against the defendant at the March term, 1896, of the criminal court of said county, the first count of which is as follows:

"The grand jurors of the state of Missouri, within and for the body of the county aforesaid, being duly impaneled and sworn, upon their oath do present that J. W. Van Wye, on the seventh day of March, 1896, at the county of Buchanan, and state aforesaid, unlawfully, willfully, and feloniously, did then and there engage in the business of disseminating a certain newspaper and printed paper commonly called and known as 'The Kansas City Sunday Sun,' which newspaper and printed paper was then and there devoted mainly to the publication of scandals, whorings, lechery, assignation, intrigues between men and women, and immoral conduct ²³² of persons, against the peace and dignity of the state."

The second count of the indictment is as follows: "2. And the grand jurors aforesaid, on their oath aforesaid, do further say and present that the said J. W. Van Wye, on the 7th of March, 1896, at the county of Buchanan, and state aforesaid, did

then and there unlawfully, willfully, feloniously, and knowingly have in his possession for sale, keep for sale, assist in the sale, expose for sale, gratuitously distribute, and gave away a certain newspaper and printed paper commonly called and known as 'The Kansas City Sunday Sun,' which said newspaper and printed paper was then and there devoted mainly to the publication of scandals, whoring, lechery, assignations, intrigues between men and women, and immoral conduct of persons, contrary to the form of the statutes in such case made and provided, and against the peace and dignity of the state."

A motion to quash was overruled, and the defendant was arraigned, tried, and convicted and sentenced to imprisonment in the penitentiary for two years. .

This indictment was founded upon an act of the thirty-sixth general assembly (Laws of 1891, p. 125), which is as follows:

"Section 1. Every person or persons who shall, within this state, engage in the business of editing, publishing, or disseminating any newspaper, pamphlet, magazine, or any printed paper, devoted mainly to the publication of scandals, whorings, lechery, assignations, intrigues between men and women, and immoral conduct of persons, or any person or persons who shall knowingly have in his or her possession for sale, or shall keep for sale, or expose for sale, or distribute, or in any way assist in the sale or shall gratuitously distribute, or give away, any such newspaper, pamphlet, magazine, ²³³ or printed paper in this state, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by imprisonment in the penitentiary for a term of not less than two nor more than five years."

The defendant urges various grounds for reversal and they will be considered in the order of their importance.

1. The constitutionality of the act of 1891, already quoted, is assailed because it is claimed to be in contravention of section 14 of the bill of rights of Missouri. That familiar section ordains that "no law shall be passed impairing the freedom of speech; that every person shall be free to say, write, or publish whatever he will on any subject, being responsible for all abuse of that liberty; and that, in all suits and prosecutions for libel, the truth thereof may be given in evidence."

This court has heretofore often asserted its right and duty to determine whether a legislative enactment solemnly passed and promulgated according to the forms of our constitution was in fact and substance repugnant to the constitution, and, if so, to declare it void. The exercise of this most important authority

has attracted the attention of all intelligent students of our system of government. In assuming this high function, our courts do not proceed on the theory that the judiciary is in any way superior to the two other co-ordinate departments, the executive and legislative, but solely because, being required to declare the law of every case coming before them, they must enforce the constitution as the paramount law whenever they find an enactment of the general assembly in conflict with it. Such questions are always delicate, and none are more so than when it is charged that the freedom of speech and of the press has been invaded by an act of the legislature.

Keeping in view, then, the relation of this court to ²²⁴ the executive and legislative branches of our state government and the transcendent importance of preserving the freedom of the press and of speech in a free country, let us subject the act in question to this constitutional test.

"The liberty of the press," says Lord Mansfield, in *King v. Dean of St. Asaph*, cited in note to 3 Term Rep. 431, "consists in printing without any previous license, subject to the consequence of law." Lord Ellenborough defines it in *Rex v. Cobbett*, 29 How. St. Tr. 49, in this way: "The law of England is a law of liberty, and, consistently with this liberty, we have not what is called an imprimatur; there is no such preliminary license necessary. But, if a man publish a paper, he is exposed to the penal consequences, as he is in every other act, if it be illegal."

Thus understood, the provision in our bill of rights was adopted substantially in the constitutions of several states of our American Union and in the federal constitution. Says Judge Cooley: "It must be evident from these historical facts that liberty of the press, as now understood and enjoyed, is of very recent origin; and commentators seem to be agreed in the opinion that the term itself means only that liberty of publication without the previous permission of the government, which was obtained by the abolition of the censorship": Cooley on Constitutional Limitations, 6th ed., 516; Hallam's Constitutional History of England, c. 15; De Lolme's Constitution of England, 254; 4 Blackstone's Commentaries, 151; Story on the Constitution, sec. 1889; 2 Kent's Commentaries, 17, et seq; Rawle on the Constitution, c. 10.

The constitutional liberty of speech and of the press, as we understand it, simply guarantees the right to freely utter and publish whatever the citizen may desire and to be protected in so doing, provided always that such publications are not blas-

phemous, obscene, ²³⁵ and scandalous in their character so that they become an offense against the public, and by their malice and falsehood injuriously affect the character, reputation, or pecuniary interests of individuals. The constitutional protection shields no one from responsibility for abuse of this right. To hold that it did would be a cruel libel upon the bill of rights itself. The laws punishing criminal libel have never been deemed an infringement of this constitutional guaranty. Equally numerous and strong are the decisions that obscene publications are without the protection of this provision of our constitution.

In his singularly felicitous and forcible style Judge Philips, in *United States v. Harmon*, 45 Fed. Rep. 414, sustained the constitutionality of a federal statute, section 3893 of the Revised Statutes of the United States (25 Stats. 496), prohibiting the depositing or sending of obscene publications through the post-offices of the United States. He says: "It may as well be said here as elsewhere that it is a radical misconception of the scope of the constitutional protection to indulge the belief that a person may print and publish, ad libitum, any matter, whatever the substance or language, without accountability to law. Liberty, in all its forms and assertions in this country, is regulated by law. It is not an unbridled license. Where vituperation or licentiousness begins, the liberty of the press ends. . . . While happily we have outlived the epoch of censors and licensors of the press, to whom the publisher must submit his matter in advance, responsibility yet attaches to him when he transcends the boundary line where he outrages the common sense of decency, or endangers the public safety. . . . In a government of law, the law-making power must be recognized as the proper authority to define the boundary line between license and licentiousness, and it must likewise remain the ²³⁶ province of the jury—the constitutional triers of the fact—to determine when that boundary line has been crossed."

This view of the constitutionality of the federal law was affirmed on error by the circuit court of the United States in *Harman v. United States*, 50 Fed. Rep. 921, upon the authority of *Ex parte Jackson*, 96 U. S. 727, and *In re Rapier*, 143 U. S. 110. Similar statutes to this have been sustained in our sister states: *Commonwealth v. Holmes*, 17 Mass. 336; *In re Banks* (1895), 56 Kan. 242; *Strohm v. People*, 160 Ill. 582. And this is the recognized practice in England, from whom we inherited our views of liberty to a large degree: *Regina v. Hicklin*, L. R. 3 Q. B.

360; *Queen v. Bradlaugh*, L. R. 2 Q. B. D. 569; *In re Besant*, L. R. 11 Ch. Div. 508.

The act, in our judgment, was clearly within the legitimate scope of legislation and in no sense obnoxious to the fourteenth section of the bill of rights of Missouri.

2. Conceding, however, that defendant was indicted for the transgression of a valid enactment, he could only be punished by the judgment of a legally constituted court. An essential in the formation of such a court is a duly qualified judge. Defendant now makes the objection that special Judge Woodson was not sworn. The record contains a written stipulation that Hon. A. M. Woodson, a member of the bar, possessed of all the qualifications of a circuit judge, should try said cause. It next recites that thereupon Mr. Woodson appeared to take upon himself the duties of special judge to try this cause, and that "the oath of office as special judge is waived."

The objection is without merit, either in a court of conscience or law. It was ruled in *Grant v. Holmes*, 75 Mo. 109, that parties, having waived the oath by a special judge, could not afterward be heard to object ²³⁷ that he was not sworn. It was held in *Tucker v. Allen*, 47 Mo. 488, that where parties agree that arbitrators may act without being sworn the award will be binding. To the same effect is *Vogt v. Butler*, 105 Mo. 479. Our statutes require an oath by arbitrators, referees, and special judges, and, when this oath is waived, it is uniformly held it will not vitiate the otherwise valid acts of these officials.

3. It is insisted, also, that the indictment is insufficient in that it fails to state the nature and cause of the accusation. In other words, it is contended that the defendant was entitled to be informed where the alleged newspaper is printed or purports to be printed; the date thereof; the edition of that date; to whom it was disseminated or sold; the names of the persons whose immoral conduct is published in said paper; the names of the men and women whose intrigues are set out; the identification of the scandals, whorings, lechery, and assignations published.

This court has aligned itself with those courts which require the indictment to contain allegations of all the facts necessary to support the charge: *State v. Terry*, 109 Mo. 601. Unquestionably this was essential at common law and is required by our bill of rights. This is the general rule, but there were exceptions to this rule at common law as well established as the rule itself—notably in the cases of indictments for being a common scold or barrator; for keeping a disorderly or a common gambling-house.

But, without generalizing, it will be profitable to note just what particularity the courts have required in indictments for publishing or disseminating obscene papers, pictures, or books.

The first case in chronological order perhaps is *Commonwealth v. Holmes*, 17 Mass. 336, decided in 1821. In that case the indictment charged that the defendant ²³⁸ knowingly, unlawfully, wickedly, maliciously, and scandalously did utter, publish, and deliver to A. B. a certain lewd, wicked, scandalous, infamous, and obscene printed book entitled "Memories of a woman of pleasure," which said printed book is so lewd, etc., that it would be "offensive to the court here, and improper to be placed upon the records thereof, etc.," without further averment of its contents. Parker, C. J., said: "The second and fifth counts in this indictment are certainly good; for it can never be required that an obscene book and picture should be displayed upon the records of the court; which must be done if the description in these counts is insufficient."

In *People v. Girardin*, 1 Mich. 90, the indictment set forth among other things that the defendant did wickedly print and publish and cause to be printed and published a certain wicked, nasty, filthy, bawdy, and obscene paper and libel, entitled, "City Argus," in which said paper were contained divers wicked, false, feigned, impious, impure, and obscene matters, language, and descriptions. While recognizing the general rule in criminal charges the court held this sufficient, and cited *Commonwealth v. Holmes*, 17 Mass. 336, with approval.

In *Fuller v. People*, 92 Ill. 182, two counts in the indictment were held good which charged the defendant with unlawfully having in his possession a certain obscene and indecent picture, without setting out the particulars in which the obscenity consisted, and Justice Scholfield held the counts good, citing *McCutcheon v. People*, 69 Ill. 601; *Warriner v. People*, 74 Ill. 346.

In *State v. Brown*, 27 Vt. 619, Chief Justice Redfield held the indictment good, saying, "ordinarily the indictment should set forth the book or publication in haec verba. . . . But, in a case like the present, if the paper is of a character to offend ²³⁹ decency, and outrage modesty, it need not be so spread upon the record. . . . And if it is alleged, in such case, to be a publication within the general terms in which the offense is defined by the statute, it is sufficient; which seems to be done in the present case": See, also, *State v. Pennington*, 5 Lea, 506; *State v. Smith*, 17 R. I. 371.

In *Bradlaugh v. Queen* (1878), L. R. 3 Q. B. D. 607, the foregoing American decisions were examined and discussed but were not followed, the appellate court overruling Cockburn, C. J., and Mellor, J., before whom the case was tried, *Queen v. Bradlaugh*, L. R. 2 Q. B. D. 569, and holding that it was necessary to set out the words of the obscene libel or book, in *haec verba*.

In *State v. Hayward*, 83 Mo. 299, section 1542 of the Revised Statutes of 1879 was construed, and it was held that it was not sufficient to simply follow the language of the statute. In that case neither the American nor English precedents had been followed.

The statute we now have before us for construction was evidently enacted to suppress a class of so-called newspapers which were mainly filled with obscene matter and salacious scandals thoroughly calculated to exercise a most corrupting and depraving influence not only upon the youth of the commonwealth but upon adults, save those of firm and stable minds. The object and design of the statute is most praiseworthy and commendable. The miserable excuse that the purpose of the publishers of these nasty blackmailing sheets was to reform the parties whose scandals and vices they portray was not credited by the legislature, and, to the most casual observer of the trend of such publications, it is evident that they further and aggravate such offenses rather than deter the offenders.

Similar statutes have been enacted in our sister ²⁴⁰ states and vigorously upheld by their courts of last resort. Among others the legislature of Illinois in 1889 enacted a law to suppress selling, lending, giving away, or showing any minor child any paper or publication principally devoted to illustrating or describing immoral deeds. Under this act, by a rather singular coincidence, a party was indicted whose name as defendant in that case appears to be the same as the counsel who appears for the defendant in this case: *Strohm v. People*, 160 Ill. 582; 60 Ill. App. 128.

In that case the indictment charged that on the sixteenth day of November, 1892, the defendant did unlawfully sell, give away, and show, etc., to one Burt Damon, who was then and there a minor child, a certain newspaper known as "The Sunday Sun," purporting to be published in Chicago, which said newspaper was then and there devoted and principally made up of criminal news, police reports, and accounts of criminal deeds and stories of bloodshed, lust, and crime, contrary to the statute. Every objection here urged was there made to that indictment, but the supreme court of Illinois and the appellate court each held it

sufficient. Said the supreme court: "It would be unreasonable, absurd and impracticable to require that the entire matter contained in the newspaper should be stated at length in the indictment, and the setting out of a part only of the contents would not show that such newspaper was devoted to and principally made up of matter of the kinds mentioned in the act."

We have seen that even at common law it was sufficient to charge a party as a common scold, a common barrator, or the keeper of a common bawdy-house or a common gambling-house without setting forth any particular acts of barratry or scolding: 1 Chitty's Criminal Law, *231. Keeping a bawdy-house was punishable ²⁴¹ as a common nuisance not only in respect of its endangering the public peace by promoting quarrels among dissolute and debauched characters, but because it had a tendency to corrupt the manners of the people by an open profession of lewdness: 1 Jacobs' Dictionary of Law, 304. Upon identically the same principle was this statute enacted, and doubtless such a paper would have been declared a common nuisance at common law: Sidney's case, Sid. 168; Wilkes' case, 4 Burr. 2530; 2 Archbold's Criminal Practice and Pleading, 1770.

How can it be said that defendant was not advised of the nature of the accusation against him? He is advised that on a day certain he sold a newspaper, a thing certain; of the name of "The Kansas City Sunday Sun," the specific name of the said newspaper, and purporting to be published in Kansas City, and that said paper was mainly devoted to the publication of scandals, whorings, lechery, etc. To require a more definite description would be to compel a copy of the whole paper to be set out which would be impracticable. Neither the organic nor statute law requires that to be done which is utterly unreasonable. "Lex non cogit ad impossibilia," is a maxim of the common law as appropriate to our day as in the days of Hobart.

The strict ruling in *Queen v. Bradlaugh*, L. R. 2 Q. B. D. 569, was soon remedied by an act of parliament: Act 43, Victoria No. 24; Act 15, Victoria No. 4; Ex parte Collins, 9 N. S. W. L. R. 497.

While it is not always sufficient to charge an offense in the language of the statute, yet, when the words of the statute creating the offense plainly indicate the nature of the crime, it is sufficient to charge the offense substantially in the words of the act. The act under consideration so plainly designates the criminal act to be the selling or disseminating an obscene newspaper ²⁴² that we think when, in addition to that, it gives the name of

the paper, the date thereof, and when sold, the sale or dissemination by defendant, and a general description of the contents of the paper itself, it is sufficient: Bishop on Criminal Procedure, sec. 611, and cases in note 3.

Whether it is a prohibited paper must be determined by the jury under the instructions of the court, the test of obscenity being that which shocks the ordinary and common sense of men as an indecency. In this case, moreover, no possible harm could have resulted to defendant for want of a more definite description of the paper as he took the stand in his own behalf and testified that he bought and sold "The Kansas City Sunday Sun" because there was good profit in it. He purchased directly from the company which published it, and circulated about three thousand copies thereof every week at a profit of two and one-half cents per paper; that he read the articles therein about people in St. Joseph. It was shown beyond a doubt that on the seventh day of March, 1896, the day alleged in the indictment, the defendant sold copies of "The Kansas City Sunday Sun" bearing date "Sunday, March 8, 1896"; the paper purchased of defendant on that date was offered and read in evidence. While it may have been better to allege the date in the indictment as a means of identifying the paper, no doubt could have arisen as to the paper he sold and for the dissemination of which he was indicted. We hold the indictment was sufficient after verdict: *Rosen v. United States*, 161 U. S. 29.

4. As to the evidence some objections were made, but in view of the overwhelming proof of the sale by defendant and of the scandalous and obscene character of the paper, no possible harm could have resulted from any of the questions asked and objected to.

²⁴³ 5. Another material question is raised upon the record, and it relates to the competency of a juror, Harvey Campbell. On his voir dire he stated that he had an opinion that "The Kansas City Sunday Sun" ought to be suppressed but he had no opinion whatever as to the guilt or innocence of the defendant, Van Wye. He had never read a copy of the said newspaper; his opinion was formed wholly from public talk. He could give an impartial verdict if selected as a juror, and would not permit the opinion he had formed on rumor to bias him. He had never read a single article in the newspaper, and only formed his opinion from what he understood was the general tone of the paper. The juror was clearly competent under the express provisions of our statute: Rev. Stats. 1889, sec. 4197.

6. Finally the verdict is attacked on several grounds. There is no force in the point that a penitentiary sentence of two years is a cruel and unusual punishment within the meaning of the constitution. The offense of which defendant was convicted is far more dangerous to society than the stealing of thirty dollars worth of goods, to which a similar punishment is affixed. Neither is the objection good which assails the verdict because it did not find specifically on one of two counts. As both counts related to one and the same transaction a general verdict was sufficient: *State v. Pitts*, 58 Mo. 556; *State v. Noland*, 111 Mo. 473. The verdict is defective, however. It neglects to state the amount of punishment. It says the jury assessed "his punishment at two (2) in the penitentiary." They evidently intended two years. No point is made on this in the brief, but it is our duty to consider it as the verdict is a part of the record proper. Omitting the failure to assess the punishment did not vitiate the verdict. It was still a good general verdict of guilty, and our statute requires the court to assess the ²⁴⁴ punishment when the jury fails to do so, and this the court did and assessed the punishment at the lowest penalty prescribed by the act.

Our conclusion is, that there is no reversible error in the record and the judgment is affirmed.

Sherwood and Burgess, JJ., concur.

CONSTITUTIONAL LAW—POLICE POWER—SUPPRESSION OF NEWSPAPER.—The legislature may regulate by law the sale of any article the use of which would be detrimental to the morals of the people: *State v. Gurney*, 37 Me. 156; 58 Am. Dec. 782. In *Ex parte Neill*, 32 Tex. Crim. Rep. 275; 40 Am. St. Rep. 776, it was held that the power to suppress newspapers or to prohibit their publication is not within the compass of legislative action by a state; and any law enacted for that purpose is clearly in derogation of the constitutional liberty of the press, but it was shown that the court would have held otherwise had the publication in question been blasphemous, obscene, or scandalous.

CONSTITUTIONAL LAW—CRUEL AND UNUSUAL PUNISHMENTS—PROVISION AGAINST.—The clause in the constitution prohibiting the infliction of cruel or unusual punishment confers power upon the courts to declare void legislative acts prescribing punishment for crime in fact cruel and unusual: *People v. Durston*, 119 N. Y. 509; 16 Am. St. Rep. 859, and note. For interpretations of this provision, see *Burlington etc. Ry. Co. v. Dey*, 2 Iowa, 312; 31 Am. St. Rep. 477; *Barker v. People*, 3 Cow. 686; 15 Am. Dec. 322; *State v. Pettie*, 80 N. C. 367; 30 Am. Rep. 88.

INDICTMENT—WHEN SUFFICIENT.—An indictment stating an offense in the terms of the statute creating it should be deemed sufficiently technical: *Meadowcroft v. People*, 163 Ill. 56; 64 Am. St. Rep. 447, and note.

INDICTMENT — DIFFERENT COUNTS — SUFFICIENCY OF GENERAL VERDICT.—If there are several counts in an indictment,

on the bringing in by the jury of a general verdict the court may apply the verdict to any one of the several counts of the indictment and order judgment and sentence accordingly: *Southern v. State*, 34 Tex. Crim. Rep. 144; 53 Am. St. Rep. 702, and note.

TRIAL—COMPETENCY OF JURORS—QUALIFIED OPINIONS. It is not error for a court to overrule a challenge of jurors who, on their voir dire, state that they have read in the newspapers what purported to be the facts of the case, and had formed and expressed some opinion therefrom upon the merits, but that it was not fixed and would not influence their verdict: *State v. Kelly*, 28 Or. 225; 52 Am. St. Rep. 777, and note. See, also, *Arp v. State*, 97 Ala. 5; 38 Am. St. Rep. 137, and monographic note to *Commonwealth v. Brown*, 9 Am. St. Rep. 744-760, as to disqualifications of jurors.

DAGGS v. ORIENT INSURANCE COMPANY.

[186 MISSOURI, 382.]

CORPORATIONS—FOREIGN—RIGHT OF STATE TO CONTROL.—A state has power to prevent the making of contracts within its borders by foreign corporations, or it may impose such terms as it may deem expedient, provided they do not conflict with the exclusive powers of Congress.

CORPORATIONS—FOREIGN INSURANCE COMPANIES—RIGHT OF STATE TO CONTROL.—A state has power to wholly exclude foreign insurance companies from doing business within the state, or it may revoke a license already granted, or it may impose the conditions upon which it will permit them to do business within its limits.

CONTRACTS, PLACE OF.—A fire insurance policy written on real property situated in one state, delivered and accepted by the owner there, is a contract made in that state, and must be construed according to its laws, though issued by a foreign insurance company.

CONSTITUTIONAL LAW—INSURANCE.—A statute providing that in all actions upon fire insurance policies "hereafter issued or renewed, the defendant shall not be permitted to deny that the property insured was worth at the time of issuing the policy, the full amount insured," is not in conflict with the fourteenth amendment to the constitution of the United States prohibiting any state from making or enforcing any law abridging the privileges or immunities of citizens of the United States.

CONSTITUTIONAL LAW—INSURANCE—LOCAL LAWS—RETROSPECTIVE LAWS.—A statute providing that in all actions upon fire insurance policies "hereafter issued or renewed, the defendant shall not be permitted to deny that the property insured thereby was worth at the time of the issuing of the policy the full amount insured" is a general, and not a local or special, law, within a constitutional provision prohibiting the enactment of local or special laws "regulating the practice or jurisdiction of, or changing the rules of evidence in, any judicial proceeding or inquiry before the courts"; nor is such a statute a retrospective law nor a law impairing the obligation of contracts, nor does it deprive any person of the natural right to life, liberty, and the enjoyment of the gains of his own industry.

CONSTITUTIONAL LAW—CORPORATIONS ARE NOT "PERSONS" within the meaning of a constitutional provision providing that no person shall be deprived of the natural right to life,

liberty, and the enjoyment of the gains of his own industry; nor does such provision restrict the right of the state to prescribe conditions upon which foreign corporations may transact business within its limits.

INSURANCE — FOREIGN CORPORATIONS — RESTRICTIONS.—A foreign insurance company, having availed itself of the privilege of doing business within a state under the restrictions of a valid statute thereof, its contracts of insurance therein must be governed by such statute.

McVey & Cheshire, for the appellant.

A. J. Daggs, for the respondent.

³⁸⁸ GANTT, J. Action upon a fire insurance policy issued upon a barn belonging to respondent in Scotland county, Missouri, on the third day of June, 1893, for eight hundred dollars, by a corporation organized in Connecticut.

The policy contained a clause limiting the company's liability "in case of loss to the actual cash value of the property at the time of the loss," and this stipulation was pleaded, together with an averment that at the time said property was insured said barn did not exceed one hundred dollars in value. No fraud was charged, or any subsequent depreciation in the property prior to the fire.

It is apparent from the foregoing dates that the policy was written and delivered after sections 5897 and 5898 of the Revised Statutes of 1889 had been enacted by the general assembly of this state.

Section 5897 provides that: "In all suits brought upon policies of insurance against loss or damage by ³⁸⁹ fire hereafter issued or renewed, the defendant shall not be permitted to deny that the property insured thereby was worth at the time of the issuing of the policy the full amount insured therein on said property; and in case of total loss of the property insured, the measure of damage shall be the amount for which the same was insured, less whatever depreciation in value, below the amount for which the property is insured, the property may have sustained between the time of issuing the policy and the time of the loss, and the burden of proving such depreciation shall be upon the defendant; and in case of partial loss, the measure of damage shall be that portion of the value of the whole property insured, ascertained in the manner hereinafter prescribed, which the part injured or destroyed bears to the whole property insured."

Section 5898 provides that no condition of any policy of insurance contrary to the provisions of "this article" (meaning thereby article 4) shall be legal or valid.

The defendant, in its answer, averred that these two sections were unconstitutional, and were in contravention of the constitution of Missouri and the constitution of the United States.

To this plea the circuit court sustained a demurrer, and, defendant declining to plead further, judgment was rendered for the amount of the policy. All other questions were settled in favor of plaintiff by the admissions of defendant.

A statute similar in principle to the statute above quoted was construed by this court in bank in *Havens v. Germania Fire Ins. Co.*, 123 Mo. 403, 45 Am. St. Rep. 570, and full effect given to its provisions: Rev. Stats. 1879, sec. 6009. It was pointed out in that case that laws of this character had been enacted in many of the states of the Union, and uniformly sustained, as entering into and molding ³⁹⁰ insurance contracts thereafter written in said states: *Queen Ins. Co. v. Leslie*, 47 Ohio St. 409; *Chamberlain v. New Hampshire Fire Ins. Co.*, 55 N. H. 249; *Reilly v. Franklin Ins. Co.*, 43 Wis. 449; 28 Am. Rep. 552; *Emery v. Piscataqua etc. Ins. Co.*, 52 Me. 322.

In those cases, it is true, the constitutionality of the several statutes was not directly passed upon; but the fact that so many courts of last resort have uniformly sustained such enactments is a most cogent reason why this court should proceed with the utmost care in the determination of their validity with reference to the charge that they conflict with the constitution of the United States and of this state.

If sections 5897 and 5898 of the Revised Statutes of 1889 are not unconstitutional, they must be held, according to the great weight of authority, to enter into and form a part of the contract of insurance as fully as if written into it; and, if any of the stipulations of the policy conflict with the statute, such stipulations must yield to the law: *Havens v. Germania Fire Ins. Co.*, 123 Mo. 403; 45 Am. St. Rep. 570, and authorities there cited.

By the terms of the two sections under consideration they only apply to contracts of insurance "issued or renewed" after the said sections went into effect. They are, then, wholly prospective in their operation, and the insurance in this case was written long after said sections became the law of Missouri. So that, when the defendant insurance company entered into this contract, it was apprised of the law of this state which prohibited a stipulation in its policies that it would only be liable for the actual value of the property destroyed, and that the statute, by its terms, annulled this provision of the policy.

The defendant assails this statute on the ground that it violates section 1 of the fourteenth amendment of the constitution of the United States. As a predicate ³⁹¹ for this position, defendant argues at length, and cites authorities to show, that "a corporation" is "a person," within the meaning of the constitution of the United States: *Missouri Pac. Ry. Co. v. Mackey*, 127 U. S. 205; *Santa Clara Co. v. Southern Pac. R. R. Co.*, 118 U. S. 394.

But granting that a corporation is a person, within the meaning of the constitution, for certain purposes, surely no proposition is better settled than that the constitution of the United States nowhere deprives this state of the power and right to prescribe the conditions upon which it will permit foreign corporations to do business within its boundaries: *Paul v. Virginia*, 8 Wall. 168; *Philadelphia Fire Assn. v. New York*, 119 U. S. 110; *Doyle v. Continental Ins. Co.*, 94 U. S. 535; *Bank of Augusta v. Earle*, 13 Pet. 519. Again and again it has been held that the whole matter of admitting foreign corporations to do business in the state rested absolutely in the discretion of the legislature of the state. The terms it imposes may be reasonable or unreasonable. The comity ordinarily extended is accompanied by no legal sanction. The state, having extended it, may at any time revoke it. This is the doctrine steadily maintained alike by state and federal decisions: *Doyle v. Wisconsin*, 94 U. S. 50; *Doyle v. Continental Ins. Co.*, 94 U. S. 535; *Ducat v. Chicago*, 10 Wall. 415; 48 Ill. 172; 95 Am. Dec. 529; *Lafayette Ins. Co. v. French*, 18 How. 404; *Railroad Co. v. Koontz*, 104 U. S. 11; *Carroll v. East St. Louis*, 67 Ill. 568; 16 Am. Rep. 632; *Home Ins. Co. v. Davis*, 29 Mich. 238; *Noble v. Mitchell*, 100 Ala. 519; *State v. Root*, 83 Wis. 667; *Dugger v. Mechanics' etc. Ins. Co.*, 95 Tenn. 245.

The state has the power to prevent the making of contracts within its borders by foreign corporations altogether, or it may impose such terms as it may deem expedient, provided they do not conflict with the exclusive powers of Congress.

³⁹² In the case of *List v. Commonwealth*, 118 Pa. St. 322, it was held that the state has power to prescribe conditions under which foreign corporations shall do business in that state, the court saying: "We cannot regard the questions presented by this record as open questions in any sense. They are all settled emphatically and decisively by the decision of the supreme court of the United States in the case of *Paul v. Virginia*, 8 Wall. 168."

In *Paul v. Virginia*, 8 Wall. 168, the facts, briefly stated, were that Paul, a citizen of Virginia, had been appointed agent of several insurance companies organized and chartered by the state of

New York. He filed his authority to act as their agent, and complied, or offered to comply, with all the laws of Virginia prerequisite to a license to solicit and write insurance in said state, excepting the provisions requiring a deposit of bonds with the treasurer of the state, and the production to the licensing officer of the treasurer's receipt for said bonds. A license was refused him. He thereupon undertook to do business without such license, and was indicted and convicted. On writ of error to the supreme court of the United States his conviction was affirmed. It was contended in his behalf that the Virginia statute was in conflict with that clause of the constitution which declares that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states," and the clause which vests in Congress the exclusive power "to regulate commerce with foreign nations, and among the several states."

It was held by the supreme court that issuing policies of insurance is not a transaction of commerce. They are not interstate transactions, though the parties thereto are domiciled in different states. They are local transactions, and governed by local law. As to ³⁹³ "the privileges and immunities secured to citizens of each state in the several states" by the other clause relied upon, it was held they were "those privileges and immunities which are common to the citizens in the latter states under their constitution and laws by virtue of their being citizens." "It was not intended by the provision to give to the laws of one state any operation in other states." Said Mr. Justice Field: "Now a grant of corporate existence is a grant of special privileges to the corporators, enabling them to act for certain designated purposes as a single individual, and exempting them (unless otherwise specially provided) from individual liability. The corporation being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created. As said by this court in *Bank of Augusta v. Earle*, 13 Pet. 519, 'it must dwell in the place of its creation, and cannot migrate to another sovereignty.' The recognition of its existence even by other states, and the enforcement of its contracts made therein, depend purely upon the comity of those states—a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy."

If anything can be deemed settled by adjudication, then it is settled that a state can impose upon foreign insurance corporations seeking to transact insurance business in such state such

terms and conditions as it may deem proper or may wholly exclude them. It follows, then, that this act did not curtail any right vouchsafed to defendant by virtue of being a citizen of the state of Connecticut. As such corporation, it had no rights in this state save those extended by the comity of the state; and its attempt to limit its liability in case of loss to the actual damages was repugnant to the policy of Missouri as expressed in the statute above ³⁹⁴ quoted. The policy having been written on real property in this state, and delivered to the owner and accepted by him in Missouri, we hold it to be a Missouri contract, to be construed according to our own laws.

No claim can be made that it makes any unjust discrimination against citizens of other states in favor of our own, or denies them the "equal protection of our laws," as the statute, by its terms, applies alike to all fire insurance companies, whether foreign or domestic: *Missouri Pac. Ry. Co. v. Mackey*, 127 U. S. 205; *Minneapolis etc. Ry. Co. v. Emmons*, 149 U. S. 364.

2. The learned counsel for defendant have filed a most elaborate brief, a large portion of which is directed at the supposed bad policy of the statute—an argument much more appropriate before the legislature than this court. They insist it violates the fundamental idea of insurance, which is indemnity; that it encourages arson; that it increases the cost of insurance.

The time allotted us will not permit a discussion of such considerations, even if we felt called upon to defend the wisdom of the legislature. It is well known that the practices of the insurance companies, both life and fire, led to the legislation now so strenuously attacked. Promises held forth to the assured in the policies in use when this and similar statutes were enacted had "too often proven a delusion and a snare," and, as the courts were powerless to correct the evil, the legislature interposed, not only in Missouri, but in many of the states of the Union, to remedy the wrong.

The manifest policy of the statute is to prevent, rather than encourage, overinsurance, and to guard, as far as possible, against carelessness, and every inducement to destroy property in order to procure the insurance upon it. It was also designed to prevent insurance companies from taking reckless risks in ³⁹⁵ order to obtain large premiums by advising them in advance that they would be held to the value agreed upon when the insurance was written.

No company is bound to insure any piece of property without first making a survey and examination of the premises, and it is

not compelled to insure the full value then. But having the opportunity to inspect fully before insuring, and then fixing the amount of the risk, and receiving the premium based upon such valuation, it ought to be forever estopped, in case of a total loss, from denying the valuation agreed upon; and such was the law long before this statute was enacted: *Wood on Fire Insurance*, sec. 43, and cases cited; *Cushman v. Northwestern Ins. Co.*, 34 Me. 487.

The policy of the law seems to us wise and wholesome, but, if it were not, it is the province of the legislature to repeal it, and not ours to usurp legislative authority. More care in the selection of agents and more care in the inspection of the insured property will dispense with many of the objections urged against the policy of this statute.

Long prior to the enactment of this statute "valued policies" were in use as the result of contracts. By a "valued policy" a valuation was fixed in advance by way of liquidated damages to avoid making a valuation after the loss had occurred. Such agreements have been uniformly upheld against the claim that they were wagering contracts (*Universal etc. Ins. Co. v. Weiss*, 106 Pa. St. 20; *May on Insurance*, sec. 30, in note 1, and cases cited), the construction put upon a "valued policy" being that the sum agreed upon was conclusive, both at law and in equity, save in cases of fraud.

3. But it is urged that this statute changes the rules of evidence within the meaning of the constitution of Missouri: Const., art. 4, sec. 53.

That section, so far as applicable here, is in these ³⁹⁶ words:

"Sec. 53. Special and local laws prohibited.—The general assembly shall not pass any local or special law . . . regulating the practice or jurisdiction of, or changing the rules of evidence in, any judicial proceeding or inquiry before courts."

Obviously, this prohibition, by its terms, applies only to special or local laws. The enactment which defendant is combating is a general law, applicable not to a special locality, but to the entire commonwealth. It is wholly prospective in its operation, and hence does not affect any special proceeding or inquiry in any court at the time of its passage.

That the legislature, however, may enact a general law changing existing rules even as to pending causes no longer admits of a doubt: *Cooley's Constitutional Limitations*, 6th ed., 450, 451; *Rich v. Flanders*, 39 N. H. 304; *O'Bryan v. Allan*, 108 Mo. 227; 82 Am. St. Rep. 595.

4. Defendant also invokes section 15, article 2, of the constitution of Missouri, which provides "that no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be passed by the general assembly."

It is perfectly apparent that this act in no sense whatever partakes of the nature of an ex post facto law, and could, by no stretch of construction, be retrospective in its operation. It would hardly seem that a court should have been called upon to decide that the provision as to the impairment of the obligation of contracts necessarily referred to laws made after the particular contract in suit was entered into, but such was the case, and it was so ruled in *Lehigh Water Co. v. Easton*, 121 U. S. 388.

Further discussion upon this point would be useless, further than to add that for the same reasons these sections do not conflict with section 10, article 1, of the ³⁹⁷ constitution of the United States, which also forbids ex post facto laws, and all laws impairing the obligation of contracts.

5. The learned counsel for defendant insists further that this statute, which prescribes that the measure of damages in case of a loss shall be the amount for which the property was insured, is unconstitutional, in that it conflicts with article 2, section 4, of the constitution of Missouri which ordains: "That all constitutional government is intended to promote the general welfare of the people; that all persons have a natural right to life, liberty, and the enjoyment of the gains of their own industry; that to give security to these things is the principal office of government, and that when government does not confer this security, it fails of its chief design."

This last and final contention is based upon the assumption that a foreign corporation, admitted into a state under positive statutory restrictions as to its power to contract, nevertheless has all the freedom to contract that a natural person or citizen would have. In a word, their position is this: They concede, they say, that a state may exclude a foreign corporation altogether from its limits, but, if it does admit it to do business, then all the conditions imposed as the price of admission instantly vanish by virtue of the constitutional guaranty of all "the privileges and immunities of citizens of the several states."

The premise is fatal to the conclusion reached. Corporations are not citizens within the meaning of the clause of the constitution invoked by defendant. The decisions of the supreme court of the United States which hold that no state can regulate for-

eign or interstate commerce, or prevent a corporation from performing service for the United States government, or deprive a corporation of the right to remove ³⁹⁸ a cause to the federal courts, have not the slightest application to the question now under consideration.

The supreme court of the United States, in those cases, merely decided that, in so far as the character, business, or property of a foreign corporation partakes of the nature of those subjects over which the constitution gives Congress exclusive control and denies the state any control, the foreign corporation itself is removed from control of the state. This is not so, however, because it is a foreign corporation, or in distinction from other citizens or business interests, but solely because it occupies a position, or is engaged in a business, reserved wholly to federal control—a familiar illustration being the exclusive right of Congress to legislate on the subject of patent rights, and a foreign corporation owning a national patent could not be controlled by state legislation. So, also, a foreign corporation engaged in foreign or interstate commerce.

But in each of these cases it is specifically pointed out that “writing and issuing a policy of insurance is a purely local transaction, wholly subject to the law of the state where the transaction is had, and that as to such contracts the company’s rights are limited or restricted by the state law.” Those exceptions are noted to the general rule that a state has the absolute power of exclusion, and this power includes the right to allow a conditional and restricted exercise of corporate powers by a foreign corporation within the state: *Bank of Augusta v. Earle*, 13 Pet. 519; *Lafayette Ins. Co. v. French*, 18 How. 404; *Ducat v. Chicago*, 10 Wall. 410; *St. Clair v. Cox*, 106 U. S. 350; *Pembina etc. Co. v. Pennsylvania*, 125 U. S. 181.

Having availed itself of the privilege of doing business in this state under the restrictions of a statute which prescribed the effect of its contracts of insurance, ³⁹⁹ it must be governed by the laws of this state. It must be held, upon every principle of good faith, to have assented as to such business to restrictions imposed, and to have its undertakings evidenced by policies here made complete, and enforced as a like contract by our own domestic companies would be; and it is in no position to enter upon the consideration of the power of this state to enact such laws. If the defendant did not desire to abide by our laws, it could have desisted from writing insurance on property and soliciting insurance in this state: *Phoenix Ins. Co. v. Levy* (Tex. Civ. App., Dec. 4, 1895), 33 S. W. Rep. 992; *Thwing v. Great Western Ins. Co.*, 111 Mass. 93.

While it was perfectly competent for the state to have imposed more onerous burdens upon such foreign companies, it has not done it, and defendant has no right whatever to complain of the policy of our laws. The defendant did contract under this act, did take the premium and retain it, and now that the loss has occurred it must pay the loss.

The judgment is affirmed.

Brace, C. J., and Macfarlane, Sherwood, Burgess, and Robinson, JJ., concur in the opinion.

Barclay, J., concurs in affirming the judgment for reasons given in his opinion in *State v. Loomis*, 115 Mo. 307; 1 *Thayer's Cases on Constitutional Law*, 935.

CORPORATIONS—FOREIGN—RIGHT OF STATE TO CONTROL—INSURANCE COMPANIES.—A corporation of one state cannot do business in another state without the latter's consent, express or implied, and that consent may be accompanied with such conditions as the state may impose, so long as they are not repugnant to the laws of the United States: *Commonwealth v. New York etc. R. R. Co.*, 129 Pa. St. 463; 15 Am. St. Rep. 724, and note. See extended note to *Southern etc. Assn. v. Norman*, 56 Am. St. Rep. 374. As to the power of a state over foreign insurance companies, see *State v. Phipps*, 50 Kan. 609; 34 Am. St. Rep. 152, and note.

INSURANCE POLICY—PLACE OF CONTRACT.—In the absence of a contrary stipulation, a contract of insurance is deemed to be a contract of the place where the last act was done or assent given necessary for it to become a binding and operative contract: Monographic note to *McGarry v. Nicklin*, 55 Am. St. Rep. 51-53.

CONSTITUTIONAL LAW—FOURTEENTH AMENDMENT.—For a lengthy collection of cases construing the fourteenth amendment to the constitution of the United States, see the monographic note to *State v. Goodwill*, 25 Am. St. Rep. 870-890.

CONSTITUTIONAL LAW—SPECIAL OR LOCAL LAWS.—For a consideration of what statutes are within the constitutional prohibition against special or local legislation, see monographic note to *State v. Ellet*, 21 Am. St. Rep. 780-789.

CONSTITUTIONAL LAW—CORPORATION NOT A CITIZEN.—A private corporation is not a citizen of the United States within the meaning of the prohibition against abridging the privileges and immunities of citizens of the United States: Monographic note to *State v. Goodwill*, 25 Am. St. Rep. 878. See *Railroad v. Barnhill*, 91 Tenn. 395; 30 Am. St. Rep. 839, and note.

KELLY v. STAED.

[136 MISSOURI, 430.]

NEGOTIABLE INSTRUMENTS—EQUITIES AND DEFENSES.—If a negotiable note is transferred after it becomes due, the assignee takes it subject to all equities and defenses as between the maker and payee, but in such case it is only subject, in the hands of the indorsee, to such equities and defenses as are connected with the note itself, and not such as grow out of transactions disconnected therewith.

NEGOTIABLE INSTRUMENTS—REISSUE.—If a negotiable note is transferred by the payee, before or after maturity, and is taken up by him, he may reissue it, and, if reissued after due, it is equivalent to drawing a new bill at sight; but if it has been paid by the acceptor or maker at or after maturity, it becomes extinguished, and, if then reissued, the drawer or indorser is not liable on it, even in the hands of a bona fide holder. Being overdue is of itself sufficient notice of its payment.

NEGOTIABLE INSTRUMENTS—REISSUE OF NOTE SECURED BY TRUST DEED—RIGHTS OF HOLDER.—If an owner conveys land and takes an accommodation note from the grantee secured by deed of trust on the property conveyed, and the grantee subsequently conveys the land and the grantor sells the note, but pays it after maturity, the payee may reissue the note as against himself, and its transfer carries with it such trust deed. The holder of the reissued note is not affected by a release executed by the grantor and the trustee in the trust deed, and a purchaser from such grantor takes subject to the lien of such deed.

Stone & Slevin and T. P. Bashaw, for the appellants.

Judson & Taussig, for the respondent.

⁴³³ **BURGESS, J.** This action was begun in the circuit court of the city of St. Louis to enjoin the defendant, who was then sheriff of said city, from selling, under a deed of trust, certain real estate in that city.

On the twenty-second day of April, 1891, one Alonzo K. Florida was the owner in fee of the real estate in question. On that day he conveyed it by general warranty deed to Josephine L. Wellington of said city for a stated consideration, but which in fact was never paid. On the same day Josephine L. Wellington executed and delivered to said Florida her promissory note for three thousand dollars, due one year after date, with two interest notes; and to secure the payment of said notes she at the same time executed a deed of trust on said property to secure their payment, in which one Gilbert J. George was named as trustee.

Thereafter, on the same day, she, without any consideration, reconveyed all of the property to Florida, by deed of general warranty, subject to said deed of trust, Florida assuming and agreeing to pay the debt ⁴³⁴ secured by it. The notes secured

by the deed of trust were accommodation paper only. Florida afterward sold the principal note to Sallie M. and F. C. Sharp, which was not paid when it became due and went to protest. Thereafter and before the twenty-eighth day of April, 1892, Florida paid the note, took it up, and on that day sold it for value and delivered it to William Spear, but did not release the deed of trust. Spear agreed to take the security with the indorsement of Florida and Gilbert J. George (the trustee), indorsing on the note an extension for six months at eight per cent interest (the note calling for ten per cent after maturity), and paid Florida therefor three thousand dollars in cash.

On the seventh day of July following, Florida, representing to George, the trustee, that the note had been paid, induced him to join him in the execution of a deed of release reciting therein that the Wellington note had been paid. This deed was recorded on the thirteenth day of July, 1892.

On the sixth day of July, 1892, Florida and wife, by warranty deed of that date, acknowledged July 15, and recorded July 19, 1892, sold and conveyed the property to Mrs. Branconier, who thereafter, to wit, on the twenty-fifth day of October, 1892, sold and conveyed by deed of general warranty, her husband, David Branconier, joining with her, said property to the plaintiff, Catharine Kelly.

When the six months' extension matured in October, 1892, Florida asked Spear to carry the note awhile; that he, Florida, had sold the property and had made an arrangement to carry it (the note) for the purchaser. Subsequently, Florida paid the interest to Spear and asked him to hold the note until the end of the year, that is, for six months longer.

After the expiration of the time of the last extension, Spear called upon George, the trustee, to sell the ⁴³⁵ property under the deed of trust, but he was absent from the city, and refused to act. The deed of trust provided that in the event of the "absence of the trustee from the city of St. Louis, sickness, disease, or other disability, or refusal to act, the acting sheriff for the time being of the city of St. Louis, upon the request of the legal holder of the notes," etc., should act. Thereupon Spear called upon defendant Staed, the sheriff, to act as trustee, who, in accordance with said request, made publication of notice of sale under the power in the deed of trust.

Mrs. Branconier and husband and Mrs. Kelly and her husband instituted this suit to enjoin the sale, setting up the deed of re-

lease, and also that the note had been "conveyed" in the fee, and thereby annulled.

A temporary injunction being granted, an answer and motion to dissolve were filed by respondent alleging that "the note was outstanding, due, and unpaid, the property of Spear, and that the deed of release was void." The filing of this suit was the first notice to Spear of this deed of release.

Upon the trial the injunction was dissolved and the petition dismissed. At the same term two hundred and ninety-five dollars damages were assessed under the injunction bond. Appeal was first taken by plaintiffs to the court of appeals, and was thence transferred to this court.

It is contended by plaintiffs that, as Spear took the note after maturity, with notice of its dishonor, he took it subject to the defenses; that it was without consideration; that after its maturity it was paid by Florida, who had contracted and agreed to assume and pay it; and that the fact that Florida may have attempted to reissue it after he came in possession of it the second time was of no avail to Spear, the holder.

It is a rule of universal application that where a ⁴³⁰ negotiable note is transferred after it becomes due, the assignee takes it subject to all equities and defenses as between the maker and payee: Chappell v. Allen, 38 Mo. 213; Livermore v. Blood, 40 Mo. 49; Kellogg v. Schnaake, 56 Mo. 136; 1 Daniel on Negotiable Instruments, 4th ed., sec. 724 a. But in such case it is only subject in the hands of the indorsee to such equities and defenses as are connected with the note itself, and not such as grow out of transactions disconnected with the note: Cutler v. Cook, 77 Mo. 388; Barnes v. McMullins, 78 Mo. 260; Knaus v. Givens, 110 Mo. 58. It follows that as between Mrs. Wellington and Spear she could avail herself of any defense that she had against the note in the hands of Spear, that she had against it in the hands of Florida.

But the suit is not against her, as to whom it is conceded that Spear acquired the paper subject to whatever equities in the paper she had the right to assert against it in the hands of Florida. But at the time Spear acquired the note from Florida, the latter was the owner of it, having taken it up from the party to whom he had theretofore transferred it. Notwithstanding it was an accommodation note, Florida having taken it up, he had the right to reissue it, so as to bind himself, and to transfer with it to those claiming under him any ownership of the property

covered by the lien securing the note. Where a negotiable note is transferred by the payee before or after maturity, and is taken up by him, it seems that he may reissue the paper, and if after due, it is equivalent to drawing a new bill at sight: 2 Daniel on Negotiable Instruments, 4th ed., secs. 1238-1242.

Thus it is said in *Light v. Kingsbury*, 50 Mo. 331: "Such indorsement [after maturity] is equivalent to drawing a new bill at sight, and the same diligence in ⁴³⁷ making demand and giving notice is required": See, also, *Beeler v. Frost*, 70 Mo. 185.

This rule does not apply where the bill or note has been paid by the acceptor or maker at or after maturity, for in that case it becomes extinguished, and if he were to reissue it even if it were to pass into the hands of a bona fide holder, he could not hold the drawer or indorser liable, for being overdue would of itself be sufficient notice of its payment: 2 Daniel on Negotiable Instruments, sec. 1238.

But in this case the note was not paid by Mrs. Wellington, and it makes no difference whether it could have been reissued as against her or not, Florida had the right to reissue it against himself, and its transfer by him to Spear carried with it as incident thereto the deed of trust given on real property of which he was then the owner in fee to secure the payment which was prior in time, and a valid and subsisting lien on the property, at the time Mrs. Branconier and Mrs. Kelly became the purchasers of it.

The payment of the note by Florida discharged Mrs. Wellington, and he could not thereafter reissue it against her so as to put Spear in any better position than he himself occupied, but that did not prevent him from reissuing the note against himself. While it is true that the payment of the note by Florida, he being personally bound by contract with Mrs. Wellington to pay it, extinguished and satisfied the note, as to her, it was as to her only, and Florida might thereafter do as he did do—reissue it against himself: *Allen v. Dermott*, 80 Mo. 59.

There seems to us to be a marked distinction between the case in hand and *Kellogg v. Schnaake*, 56 Mo. 136. In that case, the defendant executed a note to one Christian Meyer, and secured its payment by deed of trust on certain city lots, in which one August Gehner, who ⁴³⁸ sold the notes to plaintiff, was named as trustee. Thereafter, Schnaake conveyed the same property in payment and satisfaction of the deed of trust, and it was held that the holder of the note who acquired title after maturity could not recover against defendant on the note. In this case Florida owned the fee to the lots.

Now, if Mrs. Wellington had owned the lots, and had conveyed them to Florida in satisfaction of her note, and Spear, having acquired title to it after its maturity, was suing her on the note, it may be conceded that he could not recover. Still, even in that case, we think Florida could bind himself by reissuing the note.

In *Murphy v. Simpson*, 42 Mo. App. 654, the deed of trust was canceled on the record before plaintiff purchased the property of Chambers, who was the holder of the deed of trust at the time of payment. Satisfaction of the note and deed of trust was entered of record by Chambers at the request of Metcalf, the maker of the note, who made the payment. And it was correctly held that the payment of the note by Metcalf, the maker, extinguished the deed of trust; that the encumbrance was not revived by the subsequent reissue of the note, and that the person receiving the note after its maturity was chargeable with notice of the payment of the debt, and acquired no rights under the sale as against a subsequent bona fide purchaser for value of the land. In that case payment was made by the payor, and the release of the deed of trust entered of record by the proper party, while in the case in hand the note was paid by the obligee, Florida, and the release by him made after he had reissued the note, and passed all interest in it and the deed of trust by which it was secured to Spear.

⁴³⁹ It is next conceded that by the execution of the deed of release by George, the trustee therein named, and Florida, the beneficiary, to Mrs. Wellington on the seventh day of July, 1892, the trustee divested himself of all estate in the property described in said deed, as well, also, as the power to sell under it, and, as the sheriff stood in no better position than the original trustee, thereafter, the only method of foreclosing the equity of redemption was by a suit in equity.

Schanewerk v. Hoberecht, 117 Mo. 22, 38 Am. St. Rep. 631, *Kennedy v. Siemers*, 120 Mo. 73, and *Springfield etc. Co. v. Donovan*, 120 Mo. 423, are cited in support of this contention; but in those cases the trustees had sold and conveyed the property, under the respective deeds of trust, and it was ruled that although the sales were irregular, the conveyance by the trustees passed the legal title. In the case in hand the trustee did not act under the power, but only released all interest he had in the property by executing a deed of release in conjunction with the person named as beneficiary in the deed of trust. The joinder by George in the deed of release in no wise affected the rights of Spear. He had no power to release the deed of trust. Section

7094 of the Revised Statutes of 1889 provides that it shall not be necessary for the trustee to join in the acknowledgment of the satisfaction of a deed of trust, or of its release. And the execution of the deed of release by Florida, after he had sold the paper to Spear, was equally as ineffectual to remove or release the lien created by the deed of trust: *Lee v. Clark*, 89 Mo. 553; *Hagerman v. Sutton*, 91 Mo. 533; *State Bank v. Frame*, 112 Mo. 514; *Feld v. Roanoke Investment Co.*, 123 Mo. 603.

The parties to this suit seem to have acted with the utmost good faith and fairness in all the transactions ⁴⁴⁰ out of which this litigation has grown. It is a case in which one of two innocent parties must suffer because of the wrongdoing of Florida, under whom they both claim, but our conclusion is, that the law is in favor of defendant, and in accordance therewith we affirm the judgment.

Gantt, P. J., and Sherwood, J., concur.

NEGOTIABLE INSTRUMENTS—PURCHASERS AFTER MATURITY—PROTECTION ACCORDED.—A bona fide purchaser for value of an overdue negotiable instrument holds it subject only to such equities as attach to the note itself at the time of the transfer. He takes it in the same manner that he would take any other personal property: *Davis v. Noll*, 38 W. Va. 66; 45 Am. St. Rep. 841, and note; *Koehler v. Dodge*, 81 Neb. 328; 28 Am. St. Rep. 518, and note.

NEGOTIABLE INSTRUMENTS—RIGHT TO REISSUE AFTER PAYMENT.—The general rule governing the right of any of the parties to a bill or note, who have paid the same or taken it into their possession to reissue the same as a negotiable instrument, is, that a bill or note cannot be indorsed or negotiated after it has once been paid, if such negotiation or indorsement would make any of the parties liable apparently who have already been discharged: *Extended note to Rogers v. Gallagher*, 95 Am. Dec. 588.

HARRINGTON v. CRAWFORD.

[186 MISSOURI, 467.]

BONDS—INDEMNITY AGAINST BREACH OF DUTY.—A bond indemnifying a sheriff or other officer against loss for omitting to do that which it is his duty to do, as to execute final process, is void as against public policy, and no recovery can be had thereon.

W. B. Homer, for the appellant.

E. T. Farish, for the respondent.

⁴⁰⁰ **BURGESS, J.** This cause was transferred to the supreme court from the St. Louis court of appeals because of the dissent of one of the members of that court from the opinion filed

therein: See *infra*, and 61 Mo. App. 221. We approve that opinion, and in accordance therewith affirm the judgment of that court reversing the judgment of the circuit court.

Gantt, P. J., and Sherwood, J., concur.

OPINION OF ST. LOUIS COURT OF APPEALS.

ROMBAUER, P. J. In January, 1885, the circuit court of the city of St. Louis, which had full jurisdiction of the parties and subject matter, ordered a writ ⁴⁷⁰ of restitution to issue to Henry F. Harrington, the then sheriff of the city. The writ commanded said Harrington to oust August Zelle, Michael Kinealy, and Sarah Watson from certain premises, and to deliver the possession thereof to the plaintiff in the action. The sheriff found one Mamie Williams in possession, and having reason to believe that she did not come into possession under either of the defendants, but claimed under a paramount title, he made the following return on the writ:

"I return that I decline to execute this writ by delivering possession thereunder, because I found the premises occupied by Mamie Williams, alias Mamie Moss, not a party defendant, nor claiming under them or either defendants, and not in possession of the premises when the suit was instituted."

The plaintiff in the writ thereupon sued the sheriff upon his bond, and in that action such proceedings were had that the court found the sheriff guilty of a breach of official duty, and rendered judgment against him and his sureties for the damages sustained by the plaintiff in the writ.

The present action is brought by the sheriff's administrator upon a bond of indemnity, which Kinealy, one of the defendants in the writ of restitution, had given to the sheriff, with his (Kinealy's) wife and the defendant Crawford as his sureties. The bond is conditioned to indemnify the sheriff for all loss or damages to which he may be subjected by reasons of any claim or recovery had against him for, or on account of, his failure to execute said writ of restitution. The petition states the facts above stated; that the sheriff made diligent inquiry as to the validity of the claim of Mamie Williams when the writ of restitution came to his hands; that such inquiries left the question in doubt as to whether said Mamie Williams came into possession and ⁴⁷¹ claimed under either of said defendants; and that the sheriff took said bond of indemnity in good faith. The petition then alleges that when the sheriff was sued he notified the obligors of the bond, Kinealy and Crawford, to defend the suit, but

they failed to do so. Judgment is prayed for the damages which the sheriff was required to pay, and for costs and attorney's fees incurred and paid by him in the defense of said suit.

The answer of the defendant, Crawford, among other defenses, set up the following: "That the said acts of the said sheriff set forth in said petition were illegal, against public policy, and wholly void, and that such acts furnished no consideration for the execution and delivery of said obligation so described in said petition, and the same is wholly void."

The cause was tried by the court without a jury, and, upon the trial, the foregoing facts appearing, the defendant, Crawford, asked the court to declare the law that, upon the pleadings and evidence, the plaintiff could not recover. The court refused so to declare, and, upon the request of the plaintiff, declared the law in substance that if the sheriff acted in good faith, and after diligent inquiry was unable to ascertain whether Mamie Williams came into possession and held possession under either of the defendants, or by a paramount title, then the bond taken by the sheriff for not executing the writ was supported by a sufficient consideration, and not opposed to public policy, and was a valid bond. The court thereupon found for the plaintiff, and the defendant Crawford appeals from such judgment.

The refusal to give the declaration of law asked by the defendant is the substantial error assigned by him on this appeal.

The authorities from the earliest date are uniform in holding that a contract to indemnify a sheriff or ⁴⁷² other ministerial officer for omitting to do that which he ought to do, is void as against public policy: *Blackett v. Crissop*, 1 *Ld. Raym.* 278; *Cole v. Parker*, 7 *Iowa*, 167; 71 *Am. Dec.* 439; *Cass County v. Beck*, 76 *Iowa*, 487; *Hodsdon v. Wilkins*, 7 *Me.* 113; 20 *Am. Dec.* 347; *Buffendeau v. Brooks*, 28 *Cal.* 641; *Griffin v. Hasty*, 94 *N. C.* 438; *Millard v. Canfield*, 5 *Wend.* 61; *Webber v. Blunt*, 19 *Wend.* 190; 32 *Am. Dec.* 445; *Morgan v. Hale*, 12 *W. Va.* 713; *Carroll v. Partridge*, 12 *Mo. App.* 583.

As it often happens that a sheriff in executing process is met with opposing claims, and has to act at his peril, modern legislation has provided for his indemnity in cases of seizure of personal property. Statutes to that effect exist in this state. No such indemnity is provided for where the writ affects the possession of real estate, and, if this be a legislative omission, courts cannot supply it by judicial construction. It is true that indemnity obligations given to officers to proceed with the execution of process placed in their hands have been upheld in some of the

states, on the ground that, the act being one in the furtherance of official duty, the only question which can arise is the sufficiency of the consideration, and not its legality or illegality. To that effect are the decisions in *Marsh v. Gold*, 2 Pick. 289, *Long v. Neville*, 36 Cal. 455, 95 Am. Dec. 199, and *Commonwealth v. Vandyke*, 57 Pa. St. 34. Whether such a case is distinguishable from *Kick v. Merry*, 23 Mo. 72, 66 Am. Dec. 658, followed in *Thornton v. Railroad*, 42 Mo. App. 58, where it was held that a promise of reward offered to a public officer for doing his duty was not supported by a sufficient consideration, we need not decide, as here the promise was one held out to the officer for obstructing the execution of final process, and such promises have been held uniformly unlawful as tainted with an illegal consideration: *Murfree on Sheriffs*, sec. 635.

473 Courts have gone to a great extent toward relieving officers placed, without their fault, in a position where in doubtful cases they must act at their peril. In *Foster v. Clark*, 19 Pick. 329, which case goes further in that direction than any we have been able to find, an officer was upheld in enforcing the promissory note of a third person given to him to release an attachment on mesne process. The court lays stress upon the fact that the process was mesne process and that the note was that of a third person, which might be treated in the nature of a forthcoming obligation, such obligations being always upheld in the law. We have, however, been unable to find any case which goes to the extent that an obligation, taken to protect the officer in disobeying the final process of a court from the person against whom the process is directed, can be upheld. In holding that such an obligation can be upheld as lawful, provided the officer acted upon a well-founded doubt as to the rights of the plaintiff in the writ, the trial court made a dangerous departure from principles recognized as governing the rights and duties of executive officers. This departure we cannot sanction, and hence must reverse the judgment.

As in the opinion of two members of this court there can be no recovery on the bond sued upon under the conceded facts, the cause will not be remanded. Judgment reversed.

Judge Bond concurs; Judge Biggs is of opinion that the decision of the court is opposed to the decision of the supreme court in *McCartney v. Shepard*, 21 Mo. 573, 64 Am. Dec. 250, and hence dissents. The case will therefore be certified to the supreme court for final determination.

OFFICERS—BONDS—VALIDITY OF.—A bond requiring faithful performance of official duty is as binding upon the principal and his sureties as if all the statutory duties of the officer were inserted in it: *State v. Nevin*, 19 Nev. 162; 3 Am. St. Rep. 873; but a bond void in part as against positive provision of a statute is wholly void: *Mackie v. Cairns*, 5 Cow. 547; 15 Am. Dec. 477. See extended note to *Harris v. Simpson*, 14 Am. Dec. 105; also, see extended note to *People v. Hantley*, 82 Am. Dec. 760-764, on official bonds, when valid and when void. The office of such a bond is to secure the faithful performance of the officer's duty: *Wilson v. People*, 19 Colo. 199; 41 Am. St. Rep. 242.

KANSAS CITY v. WHIPPLE.

[126 MISSOURI, 475.]

CONSTITUTIONAL LAW—POLL TAX, EXACTING FOR NOT VOTING.—A provision in a city charter requiring the levy of a poll tax for sanitary purposes in years of general election on every male resident, except such as vote at such election, is a discrimination between subjects in the same class, and is unconstitutional, under a constitution providing that taxes "shall be uniform upon the same class of subjects within the territorial limit of the authority levying the tax."

CONSTITUTIONAL LAW—PENALTY FOR NOT VOTING.—A provision in a city charter imposing a poll tax on every male resident of legal age, except such as vote at a general city election, is unconstitutional and void as imposing a penalty on voters for not voting at such election.

A. M. Allen, J. W. S. Peters, and C. O. Tichenor, for the appellant.

F. F. Rozzelle, O. H. Dean, and H. C. McDougal, city counselor, for the respondent.

⁴⁷⁷ BRACE, C. J. By section 39 of article 17 of the charter of Kansas City it is provided that ⁴⁷⁸ "Every male person over the age of twenty-one years who shall be a resident of Kansas City shall be assessed for each year in which a general election is held a poll tax of two dollars and fifty cents, which shall be collected and paid in the same manner as any other personal tax; provided, however, that if the person so assessed shall vote at the general city election held in the year for which such tax is levied, and shall receive a certificate from the recorder of voters that he has voted at such election, or shall otherwise establish in such manner as may be provided by ordinance that he has so voted, such certificate or proof shall operate to extinguish such tax for such year; but a failure to pay such tax shall not disqualify any person from voting. The first assessment of such poll tax shall be made for the year 1890. All moneys collected under this section shall be used for sanitary purposes."

This is an appeal from a judgment of the circuit court of Jackson county, in favor of plaintiff, against the defendant, for the amount of the tax provided for in this section, and for which he is liable under its provisions, if the section is a valid law, in which case the judgment should be affirmed, and this is the only question raised upon the record herein.

1. It may be conceded, so far as legislative power is concerned, that this provision of the city charter has equal authority within the limits of Kansas City, over its citizens, as a like enactment of the legislature would have over the citizens of the state at large, and that it ought to be upheld unless in conflict with the constitution of the United States, or of this state: *State v. Field*, 99 Mo. 352.

It may also be conceded that the legislative authority in this state has power to levy a capitation tax subject to the constitutional provision that the same shall be levied "for public purposes only," and ⁴⁷⁹ "shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax": Const., art. 10, sec. 3; *Glasgow v. Rowse*, 43 Mo. 479; *American Union Exp. Co. v. St. Joseph*, 66 Mo. 675; 27 Am. Rep. 382; *Tipton v. Norman*, 72 Mo. 380.

Taxes of this character in one form or another have been imposed by statute ever since the organization of the state government, as well as before: 1 Terr. Laws, secs. 1, 9, pp. 34, 37; 2 Mo. Laws 1825, sec. 1, p. 663; Rev. Stats. 1835, secs. 1, 3, p. 529; Rev. Stats. 1845, secs. 1, 3, pp. 927, 928; Rev. Stats. 1855, secs. 1, 5, pp. 1322, 1324; Gen. Stats. 1865, secs. 1, 7, pp. 95, 96; Rev. Stats. 1879, secs. 6944, 6945, 6947; Rev. Stats. 1889, sec. 7809 et seq. These taxes have always been imposed on a certain class only of the citizens of the state, and it may further be conceded that the constitutional requirement of uniformity is satisfied whenever all citizens of the same class are taxed alike: *St. Louis v. Bowler*, 94 Mo. 630.

Applying these principles to the charter provision in question, it must also be conceded that, if section 39 was stripped of its proviso, it would be a legitimate expression of the taxing power of the city, whereby an equal tax is levied upon all citizens of a certain natural and well-defined class. This uniformity is, however, at once destroyed by the proviso which, in effect, exempts from the payment of such tax every registered voter of that class who has voted at the general city election in the year in which the tax is levied, thus discriminating between the subjects of taxation in the same class in violation of the constitutional provision quoted: *St. Louis v. Spiegel*, 75 Mo. 145.

In the language of Judge Cooley: "Inequality does not necessarily follow the restricting of a tax to a few subjects only, or even to a single subject. . . . But when, for any reason, it becomes discriminative ⁴⁸⁰ between individuals of the class taxed, and selects some for an exceptional burden, the tax is deprived of the necessary element of legal equality, and becomes inadmissible. It is immaterial on what ground the selection is made, . . . for if the principle of selection be once admitted, limits cannot be set to it, and it may be made use of for the purposes of oppression, or even of punishment": Cooley on Taxation, 2d ed., 169, 170.

2. The section in question is an apt illustration of the manner in which such a principle of selection may be used for the purpose of punishment, under the guise of a tax for "public purposes," for no one can read this charter provision as a whole without coming to the conclusion that its purpose is to impose a penalty upon the voters of Kansas City for not voting rather than for the purpose of raising revenue to maintain a necessary function of the city government. In fact, the greater part of the argument of the learned counsel for the respondent is directed to the maintenance of the proposition that, to require a citizen to vote, under penalty, is a legitimate exercise of legislative authority in this state.

In support of this proposition, our attention has been called to the important character of the high trust committed to the voter, and the necessity of its discharge to the public welfare, and hence a duty to vote is deduced upon the part of all those on whom the right is conferred, which it is argued ought to be enforced by compulsory legislation. In support of this argument, we are cited to the views expressed by John Stuart Mill in his work on Representative Government, by Hon. Benjamin Butler, late governor of Massachusetts, and by Senator Hill, late governor of New York, respectively, in their messages to the general assembly of those states, to the views expressed by ⁴⁸¹ Frederick William Holls in Annals of the American Academy of Political and Social Science for April, 1891, and by the learned judge who tried this case below, in his opinion printed in the brief of counsel for respondent.

The whole force of the argument in these interesting and instructive papers is spent in the concession that by them the exercise of the elective franchise is established to be a duty, as well as a right or privilege—a concession which, for the purpose of this case, may be made, and yet the main proposition remain

unestablished, i. e., that it is such a duty as may be enforced by compulsory legislation.

The law is not always what it ought to be according to the views of many learned, thoughtful, and experienced publicists. It is not every duty which a citizen in a republican government may owe to his fellow citizens, and to his government, that he can be constrained to perform. For the performance of many of these duties reliance must be placed only on the enlightened conscience of intelligent and patriotic freemen. For it is never to be forgotten that while the citizens of this great republic are the subjects of government, whose duties as such may be enforced by the sovereign will, as expressed in the law of the land, they are also its sovereign—a sovereign, it is true, having but a single sovereign power—the power of the ballot—by the exercise of which, however, all other governmental powers and duties are created, and to which they are subordinate, and in the exercise of which alone does the citizen find his prerogative of sovereignty in the normal operations of a representative republican government.

It detracts nothing from the dignity and character of this power that in this state, under its organic law, ⁴⁸² the power is limited to a certain class of its citizens, and the mode and manner of its exercise in pursuance thereof is regulated by law. The power is a sovereign power, and, in the exercise of it, the citizen who possesses it acts as a sovereign; and, standing in the relation of a sovereign to such power, he must have the supreme and independent right of a sovereign to exercise it or not, else it ceases to be a sovereign right.

That it is not within the power of any legislative authority, national or state, to compel the citizen to exercise this sovereign right, seems to have been the common understanding of our people from the beginning of our national existence, for, notwithstanding the diligent research of counsel for respondent, and our own investigations in that direction, no other legislative enactment of the character of the one in hand has been, nor do we believe can be, found. The municipality of Kansas City in this enactment seems to have been the pioneer and sole adventurer into this field of legislation in this country since the revolution. The only precedents for it, to which we have been cited, are to be found in the legislation of some of the colonies at periods when they derived their legislative authority from the crown and parliament of England. The rights of the citizens of those colonies were then simply those of subjects, their duty to obey the

sovereign mandates in the exercise of the elective franchise, the same as in all other matters—a condition so intolerable to our forefathers that they thought the sacrifices of a war of seven years not too great a price to pay for emancipation from its thralldom, and for the proud privilege of becoming sovereigns of a government of their own creation, of which, at the same time, they became the willing subjects.

Such legislation, having for its source monarchical power, cannot be invoked as a precedent for legislation ⁴⁸³ in a government created to perpetuate the principle of popular sovereignty. It subverts the principle, and eliminates from our form of government the idea of sovereignty of the citizen, for, as said before, if suffrage is a sovereign right of the citizen, he must be as free, according to the dictates of his own untrammelled will and conscience, not to exercise it, as to exercise it on any particular occasion; otherwise, the right is not sovereign.

As no precedent for such legislation can be found in the history of the government, of course no adjudicated case can be found directly supporting it, but we are cited to a class of cases in which it is held that a citizen elected to a public office may be compelled to qualify therefor and enter upon the discharge of its duties, which, it is contended, does, by way of analogy, support it.

It is seen at once, however, that the analogy fails when we consider that the duty of a citizen elected by the sovereign will to an office created by the sovereign power is the duty of a subject, while the duty in question here is the duty of the sovereign himself. Of like character with the former is also the duty of the citizen when he is called on to bear arms, serve on juries, etc. By no such duties as these can the duty of a citizen as an elector be measured.

The right of suffrage is the basis upon which the whole superstructure of our government rests. The right to exercise it, when once conferred, must be supreme and independent, and the offices of the departments of government created by it must be confined to providing ways and means simply for its orderly exercise. In our organic law it is conferred upon a certain class of the citizens of the state and the way and mode of its exercise in an orderly manner provided for: Const., art. 8. Further control than this over ⁴⁸⁴ the right neither this nor any other state of the Union has, so far as we are advised, ever attempted to go. On the contrary, in the spirit of the construction we have placed upon this right, our organic act in another article declares

that "no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage": Const., art. 2, sec. 9. How can a citizen be said to enjoy the free exercise of the right of suffrage who is constrained to such exercise, whether he will or not, by a penalty?

In whatever light we view this charter provision, whether as imposing a tax upon each male resident of Kansas City over the age of twenty-one years who does not vote whether he can or not, or as a penalty imposed upon those who do not vote who can, it is obnoxious to the provisions of the organic law which secures to every citizen protection against partial and discriminative taxation, and against invasion of his sovereign right of suffrage, and must be held to be void and of no effect.

3. Before closing the opinion, however, it may be well to notice another point made by counsel for respondent, in which the discriminative character of this legislation, regarded as a statute imposing a tax, is sought to be avoided by comparing the provision made for the payment of the tax, by voting, to the exemption (sometimes provided, by laws which have been upheld) from a general poll tax, of those who perform public service in a voluntary fire department, or by working the public highway, etc.

But these are not strictly exemptions. Taxes may be levied in money or in services having a money value to the public, and he who pays in money does not necessarily have to pay more or less than he who pays in service, and vice versa; and it is upon this principle that these laws have been upheld. But who can estimate the money value to the public of a vote? It is ⁴⁸⁵ degrading to the franchise to associate it with such an idea. It is not service at all, but an act of sovereignty above money and above price. The ballot of the humblest voter in the land may mold the destiny of the nation for ages. Who can say it will be for weal or woe to the republic? Who that it is better that he should cast or withhold it? Who dares to put a price upon it?

The judgment of the circuit court is reversed.

All concur.

TAXES—MUST BE UNIFORM AND EQUAL.—Taxation for either state or municipal purposes must be equal and uniform upon all persons and property within the state or within the municipality: *Mauldin v. City Council*, 42 S. C. 293; 46 Am. St. Rep. 723, and note. The imposition of a tax forbidden by the constitution cannot be supported as an exercise of the police power of the state: *San Francisco v. Liverpool etc. Ins. Co.*, 74 Cal. 113; 5 Am. St. Rep. 425. See, also, *New Orleans v. Kaufman*, 20 La. Ann. 283; 29 Am. Rep. 328, and monographic note to *New Orleans v. Telephone etc. Co.*, 8 Am. St. Rep. 506-512.

CASES
IN THE
SUPREME COURT
OF
NEBRASKA.

**OAKLAND HOME INSURANCE COMPANY v. BANK OF
COMMERCE OF GRAND ISLAND.**

[47 NEBRASKA, 717.]

INSURANCE—OWNERSHIP OF PROPERTY—QUESTION FOR JURY.—If one defense, in an action on an insurance policy, is that the insured had parted with all interest in the insured property before the policy was issued, the question as to whether he was, at the time, the owner is a proper one for the jury, where the evidence is conflicting, and their finding upon this issue will not be disturbed.

INSURANCE—RECOVERY BY MORTGAGEE THOUGH POLICY IS FORFEITED AS TO MORTGAGOR—CONSTRUCTION OF POLICY.—A mortgagee is entitled to recover, to the extent of his interest, on a contract of insurance made with the owner, though the latter has transferred the insured property and assigned the policy, in violation of the contract of insurance, which provides that either of these acts shall avoid the policy, where there is attached to the policy a clause making the loss, if any, payable to the mortgagee, as his interest may appear, and where there is contained in the body of the policy a clause providing, in substance, that "if an interest shall exist in favor of a mortgagee, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto," as these two clauses must be construed together, and the "loss payable clause" must be taken as if it contained an express provision insuring the mortgagee without regard to the conditions imposed upon the owner in the body of the policy.

INSURANCE—RECOVERY BY MORTGAGEE NOTWITHSTANDING OWNER'S VIOLATION OF CONTRACT—CONSTRUCTION OF CLAUSES.—When a policy of insurance, to which is attached a clause making the loss, if any, payable to the mortgagee, as his interest may appear, provides, in the body thereof, that "if an interest shall exist in favor of a mortgagee, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto," and there is neither in the "loss payable clause," nor in any writing upon, attached to, or appended to the policy, any provision or condition carrying the

conditions of the policy into such clause, or rendering them in any manner applicable, the mortgagee is, in case of loss, entitled to recover to the extent of his interest without regard to acts or omissions of the owner which might, as between the insurer and such owner, defeat a recovery, because, in order to render the general conditions of the policy applicable to the interest of a mortgagee there must be written upon, attached, or appended to the policy, relating to the interest of the mortgagee, some provisions or conditions expressing in what manner the conditions of the policy shall be so applicable.

W. H. Platt and Ralph Platt, for the appellant.

W. H. Thompson and W. A. Prince, for the appellee.

⁷¹⁹ IRVINE, C. This was an action on a policy of fire insurance written in favor of J. Nelson Jones, and having attached an instrument signed by the agents issuing ⁷²⁰ the policy, the essential part of which is as follows: "Loss, if any, under this policy payable to the Bank of Commerce, or its assigns, as its mortgage interest may then appear." The policy and the slip attached both bore date October 17, 1889, and were both executed on that day. The policy ran for five years from that date. Not far from the time when the policy was issued, the premises insured were conveyed to one Brownfield, and an assignment to Brownfield signed by Jones appears on the policy. This bears two dates—October 17, 1889, and December 12, 1890. No written approval of this assignment appears on the policy. The Bank of Commerce was the owner of mortgages on the premises to the full amount of the policy. A total loss occurred October 19, 1890. In the district court there was a verdict and judgment for the plaintiff, which is defendant in error, to reverse which the insurance company brings the case here.

The contentions of the insurance company based on proper assignments of error, are as follows: 1. That the conveyance to Brownfield was prior to the issuance of the policy, and that therefore Jones had no insurable interest, and the policy never took effect; 2. That under the conditions of the policy it was avoided by the attempted assignment thereof before loss without the consent of the company; 3. That what is styled the "loss payable clause" attached to the policy was merely a direction as to who should receive the proceeds in case of loss; that it was subject to all the conditions of the policy, and the policy not being ⁷²¹ available to Jones because of a want of insurable interest by his conveyance of the property and assignment of the policy to Brownfield, the bank, deriving its rights entirely through Jones, cannot recover.

We shall consider these several propositions without special reference to the assignments of error on which they are based.

As to the first point, it is enough to say that there was evidence sufficient to sustain a finding that while negotiations had been carried on before the policy was issued, looking toward a sale of the property by Jones to Brownfield, and while a deed of conveyance had actually been executed, the deed had not been delivered and the contract of sale had not assumed an obligatory form until some time after the issuance of the policy. This issue was submitted to the jury under instructions, part of which were not excepted to by the company. It was properly a question for the jury: *Rochester Loan etc. Co. v. Liberty Ins. Co.*, 44 Neb. 537; 48 Am. St. Rep. 745. The verdict on this issue cannot be disturbed and it must therefore be taken as settled that Jones was the owner when the policy was issued.

We may pass over the second contention and assume, for the purposes of this case, that the subsequent transfer of the property and assignment of the policy by Jones to Brownfield would be sufficient to prevent a recovery by Jones and would vest no right in Brownfield. We do not think the soundness of this contention is necessarily involved in the decision of the case.

We therefore go directly to the claim of the plaintiff. The "loss payable clause" has already been quoted. In the body of the policy appears ⁷²³ the following: "If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest, as shall be written upon, attached, or appended hereto." That the plaintiff did have an interest as mortgagee in the subject of insurance, and that this interest was created with the consent of the company is indisputable. The question is as to the construction of the latter portion of this clause. There can be no doubt that the "loss payable clause," and this clause quoted from the body of the policy, must be construed together. It is the contention of the insurance company, in effect, that the "loss payable clause" was not an independent contract between the mortgagee and the insurer, but was simply a direction as to payment, and that the mortgagee's rights must be derived through those of the owner, in spite of the clause in the body of the policy, which it claims

should be so construed as to make all the conditions and provisions of the policy binding upon the mortgagee except as other stipulations in the "loss payable clause" might vary those provisions and conditions. If the language were ambiguous in its grammatical signification, we would be compelled to adopt that construction which would be more favorable to the insured. Insurance policies are not contracts deliberated upon, clause by clause, and effected after detailed negotiations between insured and insurer. The actual ⁷²³ contract is for the most part entered into before the policy is delivered. The policy is proposed and tendered by the insurer on its own form. If it seeks to protect itself by a condition, it should clearly express that condition by the policy. If it resorts to ambiguous language, under familiar rules of construction, such language must be taken most strongly against the party proposing it and in favor of the other party. But we do not see any marked ambiguity in this policy. We repeat the clause, omitting words not essential to its construction on the feature before us. "If . . . an interest . . . shall exist in favor of a mortgagee, . . . the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto." "The conditions hereinbefore contained shall apply," not absolutely, but in a qualified way, "in the manner expressed in such provisions and conditions . . . as shall be written upon, attached, or appended hereto"; that is, in order to render the general conditions of the policy applicable to the interest of a mortgagee, there must be written upon, attached, or appended to the policy, relating to the interest of the mortgagee, some provisions or conditions expressing in what manner the conditions of the policy shall be so applicable. Neither in the "loss payable clause" nor otherwise by writing upon, attached to, or appended to the policy was there any provision or condition carrying the conditions of the policy into such clause or rendering them in any manner applicable. The authorities cited by plaintiff in error are not opposed ⁷²⁴ to this construction. In some cases the mortgage clause was not executed until after the policy had become voidable, and was then issued without new consideration while the insurer was ignorant of the facts avoiding the policy. In other cases the "loss payable clause" stood alone without provision in the policy as to its meaning or extent. In this case, in view of the clause in the policy, the "loss payable clause" must be taken

as if it contained an express provision insuring the mortgagee without regard to the conditions imposed upon the owner in the body of the policy. So construed, the case falls within the rule announced in the Phenix Ins. Co. v. Omaha Loan etc. Co., 41 Neb. 834. As we view the case, the mortgagee was entitled to recover to the extent of its interest without regard to acts or omissions of the owner which might, as between the insurer and such owner, defeat a recovery.

Judgment affirmed.

Harrison, J., not sitting.

When a Condition of Forfeiture in a Policy of Insurance Applies against a Mortgagee to Whom the Loss Has Been Made Payable.

There is often attached to a policy of insurance a mortgage clause, or what is known among insurance men as a "mortgage slip," by which the loss, if any, is made payable to a mortgagee of the insured property, as his interest may appear at the time of such loss; and perplexing questions are sometimes raised as to whether a condition of forfeiture in the policy applies against the mortgagee in such cases. Where the owners of property insure it in their own names, the loss, if any, being made payable to mortgagees, or the insurance is assigned, with the assent of the insurers to the mortgagees for their security, and before a loss occurs, and while the contract of insurance is in part executory, the owner increases the risk, or does a prohibited act, or omits to perform some act required by the policy, the courts seem to be disposed, in determining the question as to whether a violation of the contract by the owner is a defense to an action by or for the benefit of the mortgagee, to regard the interest of the owner and of the mortgagee as distinct subjects of insurance, and to interpret the mortgage clause or "mortgage slip" as a new and independent contract, which removes the mortgagee beyond the control or the effect of any act or neglect of the owner of the property, and renders such mortgagee a party who has a distinct interest, separate from the owner, embraced in another and a different contract: *Westchester Ins. Co. v. Coverdale*, 48 Kan. 446; *Hastings v. Westchester Ins. Co.*, 73 N. Y. 141; *Springfield Ins. Co. v. Allen Co.*, 43 N. Y. 389; 3 Am. Rep. 711; *Syndicate Ins. Co. v. Bohn*, 65 Fed. Rep. 165.

But, in most of the cases which recognize this distinction, there is a clause in the policy which provides that it, with reference to the interest of the mortgagee, shall not be invalidated by any act or neglect of the mortgagor or owner: See, *infra*. There was no such clause in the policy construed by the principal case, and that case, therefore, goes to the extreme, if not questionable, limit, in upholding the rights of the mortgagee, where there is no clause in the policy securing the mortgagee against any act or neglect of the mortgagor.

The general rule is, that if a mortgagor procures a policy to be issued to himself, loss, if any, payable to the mortgagee, the former, although the latter may have a right of recovery on the policy, is the "assured": *Grosvenor v. Atlantic Ins. Co.*, 17 N. Y. 391; *Bidwell v.*

Northwestern Ins. Co., 19 N. Y. 179; 24 N. Y. 302; Brunswick Sav. Inst. v. Commercial Union Ins. Co., 68 Me. 313; 28 Am. Rep. 56; Continental Ins. Co. v. Hulman, 92 Ill. 145; 34 Am. Rep. 122; Scania Ins. Co. v. Johnson, 22 Colo. 476; Perry v. Lorillard Ins. Co., 61 N. Y. 214; 19 Am. Rep. 272; Van Buren v. St. Joseph etc. Ins. Co., 28 Mich. 398; Hartford Ins. Co. v. Davenport, 37 Mich. 609, 613. Contra, Watertown Ins. Co. v. Grover etc. Sewing Machine Co., 41 Mich. 131; 32 Am. Rep. 272; Westchester Ins. Co. v. Dodge, 44 Mich. 420; and any violation by him of the conditions of the policy by alienation, "other insurance," or the like will defeat the mortgagee's right of action as well as that of the mortgagor. Otherwise expressed, the contract is with the mortgagor, and for the insurance of his interest, and the mortgagee can recover only where the mortgagor could have done so, had the money been payable to himself instead of being payable for his benefit to the mortgagee: Grosvenor v. Atlantic Ins. Co., 17 N. Y. 391; Buffalo Steam Engine Works v. Sun Mutual Ins. Co., 17 N. Y. 401; Bidwell v. Northwestern Ins. Co., 19 N. Y. 179; 24 N. Y. 302; Perry v. Lorillard Ins. Co., 61 N. Y. 214; 19 Am. Rep. 272; Cole v. Germania Ins. Co., 99 N. Y. 36; Moore v. Hanover Ins. Co., 141 N. Y. 219; Brunswick Sav. Inst. v. Commercial Union Ins. Co., 68 Me. 313; 28 Am. Rep. 56; Gasner v. Metropolitan Ins. Co., 18 Minn. 483; Continental Ins. Co. v. Hulman, 92 Ill. 145; 34 Am. Rep. 122; Kabrich v. State Ins. Co., 48 Mo. App. 393; Gillett v. Liverpool etc. Ins. Co., 73 Wis. 203; 9 Am. St. Rep. 784; Friemansdorf v. Watertown Ins. Co., 1 Fed. Rep. 68; Scania Ins. Co. v. Johnson, 22 Colo. 476; Dailey v. Westchester Ins. Co., 131 Mass. 173; Van Buren v. St. Joseph etc. Ins. Co., 28 Mich. 398. So, where there has been a breach by the insured of a condition rendering the policy void, neither the mortgagor nor the mortgagee can recover where the insurance is originally to the mortgagor, but by subsequent indorsement the loss has been made payable to the mortgagee: Franklin Sav. Inst. v. Central Mut. etc. Ins. Co., 119 Mass. 240; McKinney v. Western Assur. Co., 97 Ky. 474; Loring v. Manufacturers' Ins. Co., 8 Gray, 28. A provision in a policy of insurance that the loss, if any, is to be payable to a mortgagee named, as his mortgage interest may appear, amounts simply to a request or assent that the company pay the loss for the insured and to his use, to the mortgagee named. The right of action is vested in the insured: Van Buren v. St. Joseph etc. Ins. Co., 28 Mich. 398; Hartford Ins. Co. v. Davenport, 37 Mich. 609; Grosvenor v. Atlantic Ins. Co., 17 N. Y. 391, 394.

Any breach by the mortgagor of the conditions of a policy issued to him, loss, if any, payable to the mortgagee, will avoid the same: Friemansdorf v. Watertown Ins. Co., 1 Fed. Rep. 68; and a mortgagee to whom loss has been made payable cannot recover if there has been a breach by the assured of a condition rendering the policy void: Agricultural Ins. Co. v. Hamilton, 82 Md. 88; 51 Am. St. Rep. 457. In New York, it is held that, where the loss, if any, under a policy of fire insurance, issued to the owner of mortgaged premises, is made payable to the mortgagee, as his interest may appear, the undertaking as to payment is collateral and dependent upon the principal undertaking, and that, if there is a breach of conditions in the policy by the

assured, which by its terms renders it void, this defeats a recovery thereon by the mortgagee: *Moore v. Hanover Ins. Co.*, 141 N. Y. 219. The fact, it is held, that a loss is payable to the mortgagee of insured premises does not increase, lessen, or otherwise change the burden assumed by the insurance company. The same defenses may be made against the mortgagee, who brings an action on the policy, as could have been made against the insured: *German Ins. Co. v. Hayden*, 21 Colo. 127; 52 Am. St. Rep. 206.

It is not our purpose to show what violation of the condition of a policy will vitiate it, but we shall give a few illustrations showing when no recovery can be had upon the policy either by the mortgagor or mortgagee. Thus, if it contains a provision making it void in case of a sale, transfer, or change in the title of the property, voluntary or by legal process or judicial decree, an adjudication of bankruptcy in involuntary proceedings against the insured, and an assignment by the register under and in pursuance of the United States bankrupt act, is a transfer and change of title by judicial decree, within the meaning of the provision, and vitiates the policy; and the effect of such transfer is not changed by the fact that, by the terms of the policy, the loss is made payable to another who is a mortgagee of the property, as it is not his interest as mortgagee which is insured: *Perry v. Lorillard Ins. Co.*, 61 N. Y. 214; 19 Am. Rep. 272. If mortgaged property is insured, the loss, if any, payable to a mortgagee, and the mortgagor violates a condition as to transferring the title without the consent of the insurer, the policy becomes void upon breach of the condition, as the mortgagee's right is contingent on the mortgagor's compliance with the terms of the policy, and he cannot recover thereon. It is not material that the mortgage absorbs the whole of the mortgagor's interest: *Kabrich v. State Ins. Co.*, 48 Mo. App. 393. If the loss is payable to the mortgagee, and the policy provides that it shall become void if the property insured shall "be sold," a conveyance by the heirs of the assured, after his death, to the mortgagee, by a deed absolute in form and containing no mention of the mortgage and no declaration of trust in favor of the grantors, avoids the policy: *Dailey v. Westchester Ins. Co.*, 131 Mass. 173. So, if there is a clause attached to the policy making the loss, if any, payable to a third person, "as her interest may appear," and her interest is not stated, though she is, in fact, a mortgagee, this does not make her the insured. Hence, the owner's subsequent sale of the property to her, without notice to the company, and in violation of a provision of the policy, avoids it, not only as to the original owner but also as to the purchaser: *Scania Ins. Co. v. Johnson*, 22 Colo. 476. So, if a husband and wife, being mortgagors of property, take out a policy of insurance making the loss, if any, payable to the mortgagee, as his interest may appear, and the policy contains a condition prohibiting other insurance, but the wife of the assured does procure it, in her own name alone, this violates the condition of the policy, where such condition provides that such other insurance, whether valid or not, shall avoid the policy. It is the "assured" who are within the prohibition, and the assured, in such a case, are the mortgagors. The mortgagee cannot,

therefore, recover upon the policy: *Continental Ins. Co. v. Hulman*, 92 Ill. 145; 34 Am. Rep. 122. Compare *Gillott v. Liverpool etc. Ins. Co.*, 73 Wis. 203; 9 Am. St. Rep. 784. Neither can there be a recovery by the mortgagee, where there has been a breach of warranty that an insured building should not, to the knowledge of the mortgagee, be used for the purpose of carrying on any business denominated hazardous, etc., and where the loss, if any, is payable to the mortgagee: *Gasner v. Metropolitan Ins. Co.*, 13 Minn. 483. A dwelling-house had been mortgaged, conditions broken, and proceedings commenced to foreclose. The property was afterward insured, but the company did not have notice of these facts. The loss, if any, was made payable to the mortgagee, to the amount of the mortgage, and the policy stipulated that "if the property be sold or transferred, or any change take place in title or possession, whether by legal process or judicial decree, or voluntary transfer or conveyance then this policy shall be void." It was held that the insurance was upon the property of the mortgagor, and not upon the interest of the mortgagee; that the clause making the insurance payable to the mortgagee was merely a contingent order; that any violation of the terms of the policy which would defeat the right of the assured to recover upon it, would defeat the right of the mortgagee; that the foreclosure effected a change of title of the assured by legal process within the meaning of the policy, and that it consequently vitiated the policy: *Brunswick Sav. Inst. v. Commercial Union Ins. Co.*, 68 Me. 318; 28 Am. Rep. 56. If a policy of insurance is to become void, upon an alienation of the property, by sale, or otherwise, and the insured, after mortgaging the property and assigning the policy, with the consent of the insurers, conveys the equity of redemption without such consent, the policy thereupon becomes void: *Lawrence v. Holyoke Ins. Co.*, 11 Allen, 387.

If a building is insured against fire, and the policy states that the company will not insure unoccupied property, and provides that it shall be void "if the assured shall vacate the property, in whole or in part," and there is an indorsement on the policy making the loss, if any, payable to mortgagees, "as their mortgage claim may appear," the policy is void both as to the original assured and the mortgagees where the property is afterward destroyed by fire, when unoccupied: *Franklin Sav. Inst. v. Central Mut. Ins. Co.*, 119 Mass. 240. So, if the policy has a condition that it shall be void if any change takes place "in the interest, title, or possession" of the property, "whether by legal process, or judgment, or by voluntary act of the insured or otherwise," a sale of the property under a judgment enforcing a mortgage lien, and a conveyance to the mortgagee, who becomes the purchaser, constitutes such a change in the title as renders the policy void, although the mortgage was made with the company's consent, and the company made an indorsement upon the policy that the loss, if any, was payable to the mortgagee, "as his interest may appear." Such indorsement, under the circumstances, gives the mortgagee no right to recover, for his interest as mortgagee has been merged in his perfect legal title, and he has no greater right than the insured, whose act as to change of title rendered the policy void: *McKinney*

v. Western Assur. Co., 97 Ky. 474. As to indorsement, see, also, Loring v. Manufacturers' Ins. Co., 8 Gray, 28.

An indorsement on a policy of insurance making the loss, if any, payable to the mortgagee, as his interest may appear, does not operate as an assignment of the policy, nor as a contract to insure the interest of the mortgagee, who can claim only what the party originally insured is entitled to recover under his contract: Franklin Sav. Inst. v. Central Mut. Ins. Co., 119 Mass. 240; Fogg v. Middlesex Mut. Ins. Co., 10 Cush. 337; Hale v. Mechanics' Mut. Ins. Co., 6 Gray, 169; 66 Am. Dec. 410; Loring v. Manufacturers' Ins. Co., 8 Gray, 28. A mortgagee, therefore, to whom a policy of insurance is made payable, in case of loss, not being the assignee of the policy, is affected by subsequent acts of the assured, and cannot recover where the insured cannot: Loring v. Manufacturers' Ins. Co., 8 Gray, 28; Hale v. Mechanics' Mut. Ins. Co., 6 Gray, 169; 66 Am. Dec. 410; Continental Ins. Co. v. Hulman, 92 Ill. 145; 34 Am. Rep. 122; Illinois Mut. Ins. Co. v. Flx, 53 Ill. 151; 5 Am. Rep. 38; Pupke v. Resolute Ins. Co., 17 Wis. 378; 84 Am. Dec. 754; Baldwin v. Phenix Ins. Co., 60 N. H. 164. The direction on the policy to pay to the mortgagee is not an assignment of the policy. Its legal effect is that of a direction, in advance, as to the mode of payment, which, when made, is performance in the manner agreed to by the insured. Under such a direction, if assented to by the insurer, the person in whose favor the appointment is made acquires equitable rights, which the insurer is bound to regard, but the contract with the insured is not thereby merged or extinguished: Martin v. Franklin Ins. Co., 38 N. J. L. 140; 20 Am. Rep. 372; Biddeford Sav. Bank v. Dwelling-House Ins. Co., 81 Me. 566. So, if an assignment of a policy of insurance has been made by a mortgagor to his mortgagee, merely as collateral security, the mortgagor still, as a general rule, retains possession, and his interest continuing undiminished, there is no reason why the relations of the parties to the contract should be deemed changed: Buffalo Steam Engine Works v. Sun Mut. Ins. Co., 17 N. Y. 401, 407; Carpenter v. Providence-Washington Ins. Co., 16 Pet. 495, 502.

Until within the last twenty-five years the customary method of indemnifying a mortgagee against loss by fire was to indorse upon the policy words making the loss, if any, payable to the mortgagee, as his interest might appear, or words of similar import. To-day such an indorsement is rare. The reason for the change is found in the fact that the old indorsement made the mortgagee a simple appointee of the mortgagor, and put his indemnity at the risk of every act or neglect of the mortgagor that would avoid the original policy in his hands. Indemnity so "precarious, so liable to be destroyed by the ignorance, carelessness, or fraud of the mortgagors, was not satisfactory to the mortgagees," and they proceeded to make such contracts with the insurance companies, for the purpose of securing indemnity to their interests, as would not be affected by any act or negligence of the mortgagors: Syndicate Ins. Co. v. Bohn, 65 Fed. Rep. 165, 173, per Sanborn, Circuit Judge. So, where the loss is made payable to the mortgagee, the policy, or "mortgage clause," appended thereto,

and made part thereof, now usually contains a condition that the insurance shall not be invalidated by any act or neglect of the mortgagor or owner of the insured property. In such cases, the "mortgage clause" operates as a separate and independent insurance of the mortgagee's interest. It gives him the same benefit as if he had taken out a separate policy, free from the conditions imposed upon the owner, and making him answerable only for his own acts. It follows, therefore, that if a policy of insurance makes the loss, if any, payable to a mortgagee, but also expressly provides that no violation of its conditions by the mortgagor shall affect the mortgagee, the latter may recover to the extent of his own interest, notwithstanding any such violation, whether it occurred before or after the issuance of the policy: *Hanover Ins. Co. v. Bohn*, 48 Neb. 743; post, p. 709; *Phenix Ins. Co. v. Omaha etc. Trust Co.*, 41 Neb. 834; *State Ins. Co. v. New Hampshire Trust Co.*, 47 Neb. 62, 70; *Hastings v. Westchester Ins. Co.*, 73 N. Y. 141; *Ulster County Sav. Inst. v. Leake*, 73 N. Y. 161; 29 Am. Rep. 115; *Springfield Ins. Co. v. Allen*, 43 N. Y. 389, 392; 3 Am. Rep. 711; *Westchester Ins. Co. v. Coverdale*, 48 Kan. 446; *Syndicate Ins. Co. v. Bohn*, 65 Fed. Rep. 165; *Hartford Ins. Co. v. Olcott*, 97 Ill. 439; *City etc. Sav. Bank v. Pennsylvania Ins. Co.*, 122 Mass. 165; *Brown v. Roger Williams Ins. Co.*, 5 R. I. 394; *Eddy v. London Assur. Corp.*, 143 N. Y. 811; *Eddy v. Williamsburg Ins. Co.*, 143 N. Y. 656; *Hare v. Headley*, 54 N. J. Eq. 545; *Allen v. Watertown Ins. Co.*, 132 Mass. 480. Compare *Davis v. German American Ins. Co.*, 135 Mass. 251.

It is the settled law of New York that the effect of a mortgage clause, attached to a policy of insurance, whereby the interest of the mortgagee or trustee shall not be invalidated by any act or neglect of the mortgagor or owner of the insured property, is to create a new and distinct contract between the insurer and the mortgagee, by which the latter's interest is insured against loss resulting from fire, without regard to the rights of the mortgagor under the policy, and that this contract is one which will not be affected or impaired by any act or neglect of the mortgagor: *Genesee Falls etc. Assn. v. United States Ins. Co.*, 18 App. Div. (N. Y.) 587; *Hastings v. Westchester Ins. Co.*, 73 N. Y. 141; *Eddy v. London Assur. Corp.*, 143 N. Y. 811. If an owner of property insures it for the benefit of the mortgagee, an independent contract between the mortgagee and the insurer, that the insurance shall continue good as to the mortgagee, notwithstanding any forfeiture by the owner, and that, if any loss is paid to the mortgagee under such circumstances, the insurer shall be subrogated to the rights of the mortgagee under the mortgage, is valid, though the owner does not know of it: *Hare v. Headley*, 54 N. J. Eq. 545. A fire insurance policy, in the Massachusetts standard form, providing that if it "shall be made payable to a mortgagee of the insured real estate, no act or default of any person other than such mortgagee or his agents, or those claiming under him, shall affect such mortgagee's right to recover in case of loss" remains in force for the benefit of the mortgagee, so far as his interest appears, although the mortgagor has conveyed the insured premises without the consent of the insurer: *Palmer Sav. Bank*

v. Insurance Co., 166 Mass. 189; 55 Am. St. Rep. 387. Under a provision of a mortgage clause that the insurance as to the interest of the mortgagee shall not be invalidated by any act or neglect of the mortgagor or owner, a voluntary destruction, by the owner, of the property insured does not prevent a recovery by the mortgagee: Hartford Ins. Co. v. Williams, 63 Fed. Rep. 925. A mortgage clause, protecting the mortgagee against any act or neglect of the mortgagor or owner does not, however, apply where the mortgagee's own act renders the policy void: Cole v. Germania Ins. Co., 90 N. Y. 36.

BUSH v. JOHNSON COUNTY.

[48 NEBRASKA, 1.]

OFFICERS—RETIRING COUNTY TREASURER—PAYMENT TO SUCCESSOR—CERTIFICATE OF DEPOSIT.—If a person, going into office as a county treasurer, does not receive county funds, in the form of money or currency, from the retiring officer, but takes in lieu thereof, as payment to him, a certificate of deposit evidencing the deposit of county funds in a bank for safekeeping, and permits the certificate to be canceled and a new one to be issued payable to himself as county treasurer, leaving the money in the bank, this is a sufficient reception by him of the county money to render him and his sureties liable therefor, and the bank's subsequent failure, during the time of the deposit, and the officer's consequent inability to realize the money, does not relieve him or his bondsmen from such liability.

OFFICERS—LIABILITY OF, FOR PUBLIC FUNDS LOST—NEGLIGENCE.—A public officer and his sureties are answerable for public funds lost, regardless of the question of fault or negligence on the part of the officer, where the law, in positive terms, or from its general tenor, and without any limitation upon the obligation, requires that the officer shall pay over public funds which have been received and held as such; and, if the officer's bond is conditioned for the faithful performance of his duties, his sureties are liable to the same extent as their principal.

OFFICERS—RETIRING COUNTY TREASURER—LIABILITY OF, FOR PUBLIC FUNDS LOST—NEGLIGENCE.—If statutes require, by their general tenor, if not in express terms, a retiring county treasurer to account for, or to pay over, public money in his hands, and the bond of such officer is conditioned for the faithful discharge of his duties, and for the faithful accounting for, and paying over of, all county money received by him, both he and his sureties are liable for any failure on his part to pay over any of the public money, notwithstanding it may have been lost without his fault or negligence.

OFFICERS—RETIRING COUNTY TREASURER—DUTY AND LIABILITY OF BONDSMEN—DEFENSE BY SURETIES.—It is the duty of the bondsmen of a county treasurer to see that the duties of that officer are faithfully discharged. Hence, if that official, upon retiring from office, fails to turn over public money which he should turn over, and an action is brought therefor, his bondsmen cannot avail themselves of a defense that the board of county commissioners examined the accounts or report of the treasurer, and had what is denominated a "settlement" with him, or that they were negligent or careless in making such settlement.

OFFICERS—COUNTY TREASURER AND COMMISSIONERS—SETTLEMENTS BETWEEN—CONCLUSIVENESS OF.—The periodical settlements required, by the statutes of Nebraska, to be made between the county board of commissioners and the county treasurer, do not have in them the elements of a judicial determination of the subjects involved.

OFFICERS—COUNTY TREASURER—PAYMENT TO SUCCESSOR—WORTHLESS CERTIFICATE OF DEPOSIT—SETTLEMENT—FAILURE TO TURN OVER PUBLIC FUNDS—LIABILITY.—If a county treasurer, during his first term, holds a certificate of deposit on a bank for six thousand dollars, of public funds, and at the close of his first term and the beginning of the second, makes a report to, and has a settlement with, the county commissioners, but counts such certificate as so much cash, although the bank has failed, and the commissioners have no knowledge of the existence of the certificate, nor of the deposit of the money, such settlement is not binding on the county as an acceptance or approval of the certificate as so much cash accounted for, because there is a mistake in the settlement, and there is a failure to pay over public funds, for which the treasurer and his first term bondsmen are answerable, as the retention of the certificate by the treasurer, or turning it over to himself, as his own successor, do not constitute a paying over of the public funds.

S. P. Davidson, T. Appelget, and I. Reavis, for the appellants.

J. Hall Hitchcock and E. W. Thomas, for the appellee.

* **HARRISON, J.** David R. Bush was elected treasurer of Johnson county at an election held during the fall of 1889, and took possession of and commenced the performance of the duties of the office in January, 1890. He was re-elected ⁴ in the fall of 1891, and in January, 1892, closed his first and began his second term as treasurer. The other plaintiffs in error were his bondsmen for the first term. Bush's immediate predecessor in the office of county treasurer, when he turned over the office and funds in January, 1890, delivered to Bush some forty or fifty dollars in actual cash, or money in the strictest meaning of the term, and gave him certificates evidencing deposits which the retiring treasurer then had in banks, and also some checks. These were accepted by the incoming treasurer and received, as between him and the outgoing one, as payment of the amounts stated in them. One of these certificates, or checks, was for the sum of six thousand dollars, payable by the bank of Russell & Holmes at Tecumseh. Bush presented this at the banking office of Russell & Holmes, and in lieu of it received a certificate of deposit for the sum named. This he retained through and beyond the entire time and close of his first term as treasurer. In his report to the county board, at or near the close of his first term, a certain balance was shown to be on hand. A portion of this balance was this sum evidenced by the certificate mentioned.

The bank in which this money was deposited continued business in the regular manner until October, 1891, at which time it closed, a month or two before the expiration of Bush's first term. When the facts were discovered in regard to this and some other certificates of deposit—we have here to deal particularly with this one—action was instituted on the bond against plaintiffs in error to recover the amount as an alleged shortage. There were two principal questions raised by the pleadings: 1. That Bush, the county treasurer, never received the money, the six thousand dollars, to recover which was the object of this suit; and 2. That at the expiration of his term of office he made a settlement of his doings and accounts as county treasurer with the county commissioners, whereby the county became bound, and that, in consequence, it cannot, or should not, be heard to assert any claim as against the treasurer or his bondsmen. A jury was waived and a trial had. Judgment was rendered against the treasurer and bondsmen for the six thousand dollars and interest thereon. The case has been brought to this court by proceedings in error.

In regard to what transpired in January, 1889, between the outgoing treasurer and Mr. Bush, the incoming officer, in regard to the funds of the county and their transfer from one to the other of the officers, Mr. Zutavern, the retiring treasurer, testified as follows:

Q. Mr. Zutavern, what official position did you hold in this county in the years '88 and '89? A. County treasurer. Q. Who was your successor? A. D. R. Bush. Q. Do you know how much money you turned over to Mr. Bush at the time you went out of the office? A. I do not know now. Q. You may state to the court how you delivered the things in the treasurer's office to Mr. Bush, at the time your term of office expired, with reference to the money on hand. A. I turned over all the money that belonged to the county to D. R. Bush. Q. How did you turn it over? A. Why, by checks, most of it. I guess I had a little cash on hand, maybe forty dollars or fifty dollars, in the drawer, and I turned that over. I turned him over a few certificates. Q. State how it was you did not give him the money. A. I had the certificates and asked Bush if he could use them, whether they would answer as well as money, and he said they would. There was nothing said about me getting the cash, I do not think. Q. State the facts as to whether they were equivalent to cash at that time, and for how long. A. They were. Q. Did Mr. Bush ever give you any information, in any

form or manner, after this, that he could not use these * certificates, or ask you to take them up, or any of the things you turned over as the amount of money on hand? A. No, sir. Q. Why didn't you turn the money over in cash at the expiration of your term of office to Mr. Bush? A. I had these certificates and showed them to Bush and asked him if he could use them, and he said that he could. That was my reason. He said they would do him as well as money. Q. You were acquainted with the financial condition of the different banks upon which you had the bank certificates? A. I think I was. Q. You were acquainted with their condition with reference to paying of their papers presented to them, for a year after that? From that time on for another year? A. I think I was. Q. Well, what was it? A. They were good. Q. They paid all of the demands made on them? A. Yes, sir.

A portion of the testimony of Mr. Bush is as follows:

Q. Mr. Bush, you are the defendant, one of the defendants, in this case? A. Yes, sir. Q. You are the principal defendant, are you not, in this case? A. Yes, sir. Q. (Handing witness plaintiff's Exhibit "E.") What is that paper you now have? A. It is a certificate of deposit on the bank of Russell & Holmes. Q. You are the person who is named in that certificate as payee, are you? A. Yes, sir. Q. You were county treasurer at that time? A. Yes, sir. Q. It was paid to you as county treasurer? A. Yes, sir. Q. The consideration of that check was county money? A. It was a check given me for county money. Q. And you took the check to the bank and got that? A. Yes, sir. Q. At your own request? A. At the request of Mr. Charles Holmes. Q. Did you ask him for the cash? A. No, sir. Q. You did not want it? A. No, sir. Q. You could have got it? A. I do not know whether I could or not. Q. You had every reason to believe it? You had not known them to refuse any certificates, had you? A. No, sir. Q. You have got money out of there as county treasurer since that was deposited there, haven't you? A. Yes, sir. Q. That was a part of the funds you received from Zutavern, your predecessor? A. Yes, sir. Q. At the end of your first term you did not turn that over except in the form of a certificate as it appears there, to yourself? A. There was no change. Q. Just that certificate? A. Yes, sir. Q. When you settled with the county board at the end of your first term, January, 1892, you turned over that certificate in your report to the county commissioners as part of the funds on hand? A. Why, I suppose you would call it that;

simply in my own hands. Q. You turned it over to yourself as successor? A. I believe that is what it would be. Q. You never turned any cash over to represent that? A. No, sir.

^s In this connection it may be further said that all of the testimony introduced which had a bearing upon the question of whether or not the bank of Russell & Holmes was, at the time of the transaction between Zutavern and Bush, of date January, 1890, solvent and meeting all demands for payments of money made upon it, tended to establish that it was so, and so doing, and continued in such condition for more than a year subsequent thereto. It is clear from the evidence that Mr. Bush, on assuming the duties of the office of county treasurer, received from the retiring officer a check or certificate of deposit entitling him to demand from the bank of Russell & Holmes the sum of six thousand dollars, and that it was so accepted by him in such form, in lieu of the cash, either coin or legal tender currency; that he did not demand any other or different payment, but waived it, and the check or certificate of deposit was by him delivered to the bank and canceled, and at the request of the banker he received a new certificate of deposit for the sum named, payable to himself as county treasurer. The title or right to the sum of money involved was, by the methods stated, transferred from Mr. Zutavern to Mr. Bush, the latter being the recipient of it by reason of his occupancy of the office of county treasurer. The reception of this money from his predecessor was one of the duties which devolved upon the incoming treasurer, his due and proper performance of which, together with all others pertaining to the office, his sureties, by signing the bond, had guaranteed. Giving the bond was one of the essential prerequisites of his assuming the office, without which he could not legally do so, and the sureties, by their signatures, enabled him to meet this requirement and to acquire title or right to this money, and, having so acquired it, he and the bondsmen became liable to the county for it. The fact that he elected to take a certificate of deposit evidencing the indebtedness of a bank to his predecessor in office for the amount, instead of coin or currency, and to have the certificate canceled and a new one issued payable to himself ^o as county treasurer, and to let the money remain in the bank and to carry the sum thus treated in his accounts as such treasurer, as moneys or funds on hand, could in no manner or degree affect his liability or that of his bondsmen. He became possessed of the right to six thousand dollars of the funds of the county, and liable for its safekeeping and to account for it, and at the

request of the banker left it in the bank. This was a sufficient reception by him of the money of the county to render him and his sureties liable for it under the conditions of this bond within the rule announced in *State v. Hill*, 47 Neb. 456.

What effect the transactions we have outlined between the two treasurers would have upon the rights of the county, if any, existing or arising therefrom, against Zutavern, the outgoing treasurer, and his bondsmen, is not involved in this case and will not be discussed or decided. It is evident that Bush, the incoming treasurer, acquired the right to act in relation to the six thousand dollars of the county funds, and by his action it was left in the bank. This was such an act of right, of control, and disposition of the money as rendered him liable to account for it. It is argued that the treasurer is only bound to use due and ordinary care for the safekeeping and preservation of the money of the county, and if he deposited it in the bank after using reasonable and ordinary care and caution in ascertaining the standing and solvent condition of the bank, and was watchful in this particular so long as it remained there, if the bank failed and the money was thereby lost to the county, in whole or in part, without any fault or negligence attributable to the treasurer, he was not liable for such loss, nor were his sureties so liable. There exists an irreconcilable conflict in the decisions of the courts in regard to the liability of public officers and their bondsmen for funds lost without fault or negligence on the part of the officers, but the weight of authority in this country is to the effect that a public officer and his sureties are to be held responsible for public funds lost, regardless of the question of fault or negligence¹⁰ on the part of the officer, where the law, in positive terms or from its general tenor and without any limitation upon the obligation, requires that the officer pay over public funds which have been received by him and held as such. Where the statutes impose the duty of payment it is sufficient, if the bond is conditioned for the faithful discharge of the duties of the officer, to render the sureties liable to the same extent as their principal. Our statutes on the subject, by their general tenor, if not in direct terms, require the retiring treasurer to account for or pay over the public moneys. The bond in this case was conditioned for the faithful discharge by the treasurer of the duties of the office, and for the faithful accounting for and paying over of all the moneys of the county which he received, and both he and his sureties became liable for any failure on his part to pay over any of the public money, notwithstanding it may have been lost without his

fault or negligence: Board of Education v. Jewell, 44 Minn. 427; 20 Am. St. Rep. 586, and cases cited, as follows: United States v. Prescott, 3 How. 578; United States v. Dashiell, 4 Wall. 182; Boyden v. United States, 13 Wall. 17; Hancock v. Hazzard, 12 Cush. 112; 59 Am. Dec. 171; New Providence v. McEachron, 33 N. J. L. 339; Commonwealth v. Comly, 3 Pa. St. 372; State v. Harper, 6 Ohio St. 607; 67 Am. Dec. 363; District Tp. v. Morton, 37 Iowa, 550; Thompson v. Board of Trustees, 30 Ill. 99; Halbert v. State, 22 Ind. 125; Morbeck v. State, 28 Ind. 86; Ward v. School District, 10 Neb. 293; 35 Am. Rep. 477; Wilson v. Wichita County, 67 Tex. 647; State v. Nevin, 19 Nev. 162; 3 Am. St. Rep. 873; State v. Moore, 74 Mo. 413; 41 Am. Rep. 322; State v. Powell, 67 Mo. 395; 29 Am. Rep. 512; Commissioners v. Lineberger, 3 Mont. 231; 35 Am. Rep. 462; Redwood County Commra. v. Tower, 28 Minn. 45.

The case of Ward v. School District, 10 Neb. 293, 35 Am. Rep. 477, cited in the opinion of the Minnesota court just alluded to, in support of the doctrine of strict accountability of treasurers and their bondsmen for public money intrusted to the care of the treasurers by virtue of their ¹¹ being such officers, may be said to be not strictly in point, for the reason that the money lost by failure of the bank, and sought in the action to be recovered of the treasurer and his bondsmen, had been deposited by the treasurer in the bank, to his own individual credit. This court held: "The defendant, while treasurer of the plaintiff district, deposited the money in question with his banker to his own individual credit. The money was intended to meet certain bonds of the district, then about to fall due, and which were payable at that bank, and the defendant so informed the banker and directed him verbally to so apply it when the bonds were presented. While in this condition the bank failed and the money was lost. Held, that the banker was the agent of the treasurer, and not of the district, and that the money was recoverable by the district in an action on the treasurer's bond." And it was said in the text of the opinion: "It was Ward's duty, under the law, to keep the money securely until properly directed, as before shown, to pay it over to the holder of the district bonds. The money was within his control, placed there by force of the statute, and if he saw fit to intrust it to the care of another, he did so at his peril."

In the opinion in the case of State v. Sheldon, 10 Neb. 452, in stating the liability of a treasurer for public funds it was held: "The fact that the public funds have been stolen from the treas-

urer is no legal justification for the failure of the treasurer to account for them." This was not a case, however, wherein the recovery of the public funds was the object of the action, but was one in the nature of a quo warranto to oust the defendant from the office of county treasurer of Greeley county, and in reaching a conclusion as to whether the treasurer had been guilty of neglect of duty as an officer it was observed: "This being the case, the county treasurer having failed to account for the moneys in his hands, properly chargeable against him as treasurer, is guilty of willful neglect of duty and may be removed from office. And the fact ¹² that the moneys were stolen is no legal justification for the failure to account for them."

While it may be said that these cases are not in point and cannot be said to support the rule which holds treasurers to a strict accountability in respect to public funds which come into their possession as officers, for the reason that, strictly speaking, it was not the main question involved in either case, but only incidentally, yet it was so necessarily connected with the matters under discussion and which were determined, that it became necessary to pass upon it, and the decisions show what the opinion of the court was in regard to the responsibility of the treasurers for public money which they handled as officers.

It is argued that if the delivery of the certificate of deposit or check by Zutavern to Bush when the latter assumed the duties of the office was a sufficient payment to render Bush and his bondsmen responsible to the county for the amount thus paid, inasmuch as at the expiration of the first term of his services as treasurer and assumption of the duties of the second term, January, 1892, he turned this six thousand dollar certificate of deposit over to himself as his own successor, this released the sureties herein sued, who signed his bond for the first term, and the action must fail as to them. Whatever might be said of this contention had the certificate of deposit in question, at the time of the termination of the first term which Bush occupied the office as treasurer, retained its full force and vigor as a demand against the bank for the sum evidenced by its face, we must now recall to mind the fact that during the month of October, 1891, the bank payor of the certificate failed, or quit business, had passed out of existence in the business world, and the certificate of deposit was no longer a demand against a living business being, but was merely evidence of a claim against what might at some time be realized of the assets of the bank which had failed, and was certainly not entitled to be considered as such a payment when re-

tained ¹³ by Bush in making the change from his first to his second term, of the amount of funds on hand, to him as his own successor, as to render or raise a liability for the amount of the certificate against him and his bondsmen for the second term as a loss occurring during the second term, and certainly was not a paying over of the county funds which worked a release of the sureties who signed the bond for the first term. The failure to otherwise pay the sum expressed by the face of the certificate, at the expiration of the first term of office, was such a failure to faithfully discharge the duties of the office required by law, to faithfully account for and pay over all funds which had come into his hands or under his control by virtue of his office, as rendered him and the sureties for the first term liable therefor.

A further contention is made on behalf of plaintiffs in error, that the county board, or commissioners, had settled with Mr. Bush, comprehending in such settlement all his actions as county treasurer during his first term, and had examined his final account and approved it and made such approval a matter of record; that this constituted an adjudication of all these matters which was final and conclusive; hence this action will not lie. Our statutory law requires the county treasurer to make periodical reports, which must show, somewhat in detail, the main transactions, more particularly in relation to disbursements of the public moneys and balances remaining on hand in the various funds, and these must be scrutinized and passed upon by the county board, and they make what is denominated a settlement with the treasurer. But call it what you may, we are satisfied that it is nothing more than an examination of the accounts and report of the business acts of the treasurer during the period covered by it, a scanning of such acts, a "checking up," if the expression is allowable, by the county commissioners, the parties designated by law to attend to it, made in the interest of the public and county, and for the benefit of the public and county. Its main object ¹⁴ and purpose is to maintain an espionage and supervision over the finances of the county and their management by the treasurer, and secure, by such means, as great promptitude and care and exactitude in their management as possible. It is not in any sense or degree on behalf of the sureties on the bonds of the officers. Their contract is that the officer will perform his duties faithfully and properly, and for any failure so to do they become liable. The law does not contemplate that the officer shall be watched by the county or its officers for the benefit of the

sureties. It is no part of the contract with the sureties that it shall be done; and where reports and settlements are required by law it does not change the obligation of the sureties or enter into their contract. It is their duty to see to it that the duties of the officer are faithfully discharged, and, if the county board should be negligent, or careless, or irregular in an examination of an account or report of a treasurer, or in what is termed a settlement, it would be no available defense to sureties on his bond in an action to recover an amount of public funds which the treasurer had failed to pay over. These periodical settlements assigned by our statutes to be made with county treasurers do not have the elements in them of a judicial determination of the subjects involved. It would not be contended that if the county commissioners state, as a matter of record, as the result of one of these so-called settlements, that the treasurer was short in his accounts in a stated sum and consequently indebted to the county in such sum, that this would constitute an adjudication of the whole matter, and, unless appealed from, it would be final and binding on the parties, and not open to attack. No more can the result obtained by the examination be said to be binding and conclusive upon the county in regard to the amounts reported on hand by the treasurer being the exact, true amounts, or their payment by the treasurer preclude the institution and successful prosecution of an action for any further sums which he has failed to report or to pay ¹⁵ over. It can have no further or greater conclusiveness than any settlement made between private persons. We are cited on this point in the case to the decision in the case of Ragoss v. Cuming County, 36 Neb. 375, as sustaining the position of plaintiffs in error, but we do not so read it. It was held, "Where the county board has before it a matter which it may reject or allow, and its action thereon will be final unless appealed from, its order in the premises cannot be attacked collaterally, except for fraud," which is entirely correct; but in passing upon the report of a county treasurer the board do not reject or allow it in the sense in which these words were used in the case referred to. It is only approved or disapproved, and not conclusively. In the same decision it is observed: "An officer who has faithfully performed the duties of his office, and made a full settlement with the tribunal authorized to settle the same, should be permitted to rest on such settlement unless there is fraud, mistake, or imposition in making the same." The rule announced in the third paragraph of the syllabus to the case, which we have quoted, had reference to an order of the county board allow-

ing the county clerk deputies and the application of the fees of the office to the payment of their salaries as fixed by the board, and was entirely applicable. What was said in the opinion in regard to the settlement was substantially the same as herein stated. Any settlement is all right and entitled to stand in favor of an officer who has faithfully performed the duties of his office, when in the settlement there is neither fraud nor mistake, or imposition. In support of what we have said in regard to these reports and their examination and approval and settlement, see *Crawn v. Commonwealth*, 84 Va. 282; 10 Am. St. Rep. 839; *Rose v. Douglas Tp.*, 52 Kan. 451; 39 Am. St. Rep. 354; *Waseca v. Sheehan*, 42 Minn. 57; *Britton v. Fort Worth*, 78 Tex. 227.

In the case at bar it was shown by the testimony that at the close of his first term Mr. Bush made a report or ^{1st} account which was examined by the county board. The statements of the commissioners' record in respect to the settlement had at that time were as follows: Under date January 29, 1892: "The county commissioners proceeded to settle with the county treasurer. The board adjourned to January 30, 1892." Under date of January 30, 1892: "The board then proceeded to settle with the county treasurer. Board adjourned to February 1, 1892." Under date of February 1, 1892: "The board proceeded to settle with the county treasurer. Pending settlement the board adjourned to February 2, 1892." Under date of February 2, 1892: "The board completed with the county treasurer." The account indicated the proper and true amount which had come into the possession of the county treasurer, or had been paid to him, as on hand, but it in fact included this certificate of deposit for six thousand dollars issued by the bank, which had, subsequently to such issuance, but prior to the time of settlement, failed. The fact that this was so included and counted by the treasurer as money on hand was not known by the county board. The funds were not asked for by the board, were not produced by the treasurer, and any approval of the account or report of the treasurer at that time was so made without any knowledge of the existence of the certificate of deposit, or that it figured or was claimed by the treasurer as a part of the moneys on hand. There was a mistake in the settlement, if any was made, to the amount evidenced by the certificate, and the paying over the funds shown by the report to be on hand, by Bush to himself, to the extent that it consisted of his retaining this certificate and counting it as so much money, was a failure to account and pay over the moneys of the county—a failure to faithfully discharge the duties of his

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office as required by law, and for which he and his bondsmen became liable. It follows that the judgment of the district court must be affirmed.

Norval, J., not sitting.

OFFICERS—LIABILITY OF, FOR PUBLIC MONEYS.—A supervisor, or other public officer, acting in good faith and without negligence, is responsible for the loss of moneys which come to his official custody, and therefore is answerable for moneys deposited with a firm of private bankers to his credit as such officer, upon such moneys being subsequently lost by the failure of the bankers, though in making the deposit he acted in good faith and without negligence: *Tillinghast v. Merrill*, 151 N. Y. 135; 56 Am. St. Rep. 612. He and his sureties are bound to make good any deficiency which may occur in the funds which come under his charge: *Note to Wilson v. People*, 41 Am. St. Rep. 247; *State v. Nevin*, 19 Nev. 162; 3 Am. St. Rep. 873. In some cases it is held that the liability of public officers is fixed by their bonds: *State v. Nevin*, 19 Nev. 162; 3 Am. St. Rep. 873; but in others that the measure of the liability of a public officer for the safety of public funds intrusted to him is fixed by the laws relating to his office, and not merely by the terms of his official bond: *State v. Copeland*, 96 Tenn. 296; 54 Am. St. Rep. 840. A bond requiring the faithful performance of official duty is as binding upon the principal and his sureties as if all the statutory duties of the officer were inserted in it: *State v. Nevin*, 19 Nev. 162; 3 Am. St. Rep. 873. The liability of sureties on successive bonds is the subject of a monographic note to *Crawn v. Commonwealth*, 10 Am. St. Rep. 847, 849, showing the conclusiveness of a public officer's report to, or settlement with, the proper authorities where he is about to enter upon the discharge of his duties for a second term.

JACOBSON v. VAN BOENING.

[48 NEBRASKA, 80.]

WATERS—INJUNCTION AGAINST DISCHARGE OF SURFACE WATER—FUTURE INJURY.—It is not necessary, in an action to enjoin another from maintaining a certain ditch on the latter's premises, whereby surface water is collected and discharged in a volume upon the plaintiff's land, for the plaintiff to prove that actual injury has already occurred; the remedy is preventive, and may be had upon proof that the act complained of, unless restrained, will result in damage.

WATERS—INJUNCTION AGAINST DISCHARGE OF SURFACE WATER—WHO ARE ANSWERABLE.—It is no defense to an action to enjoin another from maintaining a certain ditch on the latter's premises, whereby surface water is collected and discharged in a volume on the plaintiff's land, that the injury is in part threatened by the ditches of another. The plaintiff has his remedy against each one contributing to the injury.

ACTIONS—WHEN MOTIVE IN INSTITUTING, IS NO DEFENSE.—If the plaintiff has a valid cause of action, his motive in instituting it is immaterial, and the fact that it is inspired by malice is no defense.

INJUNCTION AS A REMEDY AGAINST DISCHARGE OF SURFACE WATER.—An injunction will lie to restrain a continuing injury to land caused from an unlawful discharge of surface water by an adjoining proprietor.

WATERS—RIGHT TO DISCHARGE SURFACE WATER—WHO ARE ANSWERABLE.—Surface water is a common enemy, and an owner may discharge it upon the land of another, without being answerable for incidental injury inflicted by his act. Such injury is *damnum absque injuria*.

WATERS—RIGHT TO DISCHARGE SURFACE WATER—NEGLIGENCE.—While one may protect his land from surface water, by discharging it upon the land of another, yet, if he is negligent in so doing, and damage results to his neighbor by reason of such negligence, he is answerable therefor.

WATERS—RIGHT TO DISCHARGE SURFACE WATER—LIMIT OF.—One's right to discharge surface water from his premises does not extend so far as to permit him to collect it in a volume, and, by means of a ditch, to discharge it, contrary to the natural course of drainage, upon the land of another.

A. H. Bowen and J. B. Cessna, for the appellant.

Smith & McCreary, for the appellee.

⁸¹ **IRVINE, C.** This was an action by the appellee against the appellant for the purpose of obtaining an injunction restraining the appellant from maintaining a certain ditch whereby it was alleged that waters collected upon the lands of appellant were discharged upon the lands of plaintiff, to plaintiff's damage. The evidence is hopelessly conflicting, and in some parts very obscure. As there was a general finding for the plaintiff, we must take it in the light in which it most strongly tends to support the allegations of the petition. So considered, it appears that the parties are owners of adjoining farms, the plaintiff's lying west of defendant's. Along the north line of these farms there is a highway. On the defendant's farm, and near the northeast corner thereof, there lie what the witnesses style two "lagoons." A review of the evidence discloses, however, that this term is used according to a local signification, and means merely a slight depression in the land, wherein in wet seasons surface water accumulates. It is quite evident that these are not permanent ponds or lakes. At some time in the past a ditch was constructed near the middle of the highway, whereby the surface water from the vicinity was collected and flowed along the highway westward into a ravine, or, as we shall hereafter style it, using another local term more accurately descriptive than any word of general use, a "draw." This draw crosses the highway north of plaintiff's land, passes over his land, and across defendant's toward the east. Shortly before this action was commenced, in accordance with

some action by the county authorities, this ditch was ⁸² filled up and another one, nearer the south side of the highway, was constructed for the same purpose and having the same outlet. The so-called lagoons, by means of smaller ditches, were connected with this ditch in the highway. The damage alleged is that whereas the natural drainage from the lagoons is southeast, these ditches divert it to the north and thence along the highway to the draw, discharging a large body of water thereby across plaintiff's lands, cutting trenches and covering the land with accretions. It also appears that by the construction of a ditch much shorter than the one now maintained, the defendant might discharge the water from the lagoons into this same draw upon his own land.

One point urged in support of the appeal is that there is no evidence that down to the time of the trial any large quantity of water had been discharged by reason of the ditches in question, or that plaintiff's lands had been in fact injured. It is true that there is very little evidence to the contrary; but we regard this as immaterial. The plaintiff was not obliged to wait until the injury had been inflicted. There is ample evidence tending to show that such an injury, in the event of a wet season, would be the result of maintaining the ditches, and the remedy sought is preventive and not compensatory. Another point urged is that the action should properly be against the county, because the damage, if any, is directly inflicted by the ditch in the highway. While the prayer of the petition seems to extend to all the ditches, the district court granted the injunction only so far as to restrain the defendant from maintaining the ditches connecting the lagoons with the ditch in the highway. Assuming for the moment that any wrong was committed by maintaining this system of ditches, the defendant was the responsible person to the extent of the water discharged by the ditch the maintenance of which was restrained. The fact that the plaintiff may have a remedy against the county or against other proprietors for similar acts contributing to the same injury does not deprive ⁸³ him of his remedy against the defendant for his share therein. Another minor point may here be disposed of. The district court excluded testimony accompanied by an offer to show that the plaintiff and others had conspired together to institute criminal and civil actions against Van Boening, contributing to the expense thereof, and with the purpose of harassing him until he should leave the township. This would be no defense to this action. If as a matter of fact the plaintiff had a good cause of

action against the defendant, his motives in prosecuting it are immaterial.

With these preliminary matters cleared away, the question remains whether the plaintiff was entitled to relief against the defendant for discharging surface water through a ditch, in a volume, upon plaintiff's land, contrary to the natural course of drainage; and the proof showing that as effective and as convenient a method of discharging water might have been availed of without discharging it on the highway or on plaintiff's land. That for a wrong of this kind injunction is an appropriate remedy was held in *Davis v. Londgreen*, 8 Neb. 43. That one's right to protect his land against surface water does not extend so far as to permit him to collect it in a volume and by means of a ditch to discharge it upon the land of another has been several times decided: *Fremont etc. R. R. Co. v. Marley*, 25 Neb. 138; 13 Am. St. Rep. 482; *Lincoln Street R. R. Co. v. Adams*, 41 Neb. 737; *Bunderson v. Burlington etc. R. R. Co.*, 43 Neb. 545. There are other cases applying the principle, but we do not cite them, for the reason that they seem rather to relate to the diversion of watercourses than of surface water. The announcement of the rule referred to is sufficient to dispose of this case; but, as it developed upon the argument that an impression prevails that the different decisions of the court have not been altogether harmonious upon the subject, it seems well to review these cases, which to our minds are in complete harmony, and to as clearly as possible state the principle which has governed all the decisions.⁸⁴ Prior to 1893 there was no case dealing with the general principles of law on the subject.

Davis v. Londgreen, 8 Neb. 43, was much like the present, except that it would seem that the pond which had been drained was permanent in its character, and not a mere depression in which surface water occasionally collected. It was held that such water could not lawfully, by means of a ditch, be discharged upon the land of one's neighbor.

Pyle v. Richards, 17 Neb. 180, was a case of the diversion of a stream, and while it has been cited in several surface water cases, it was in fact governed by different principles.

Stewart v. Schneider, 22 Neb. 286, depended for its solution entirely upon the effect of a prior decree fixing the rights of the parties, the correctness of which was not and could not have been then questioned.

Morrissey v. Chicago etc. R. R. Co., 38 Neb. 406, is perhaps the leading case on the subject. It was there announced that the

common-law rule prevails, and that therefore one has the right to defend himself against surface water and that incidental damage inflicted upon another by such acts is *damnum absque injuria*. It is this case which is thought to be in conflict with some of the others. The opinion is entirely too long to abstract here, but an examination of the case discloses that the court had always in view the fact that there was neither allegation nor proof that the railroad embankment which had caused the injury had been unnecessarily or negligently constructed. The district court gave an instruction to the effect that one might upon his own land erect such barriers as he deemed necessary to keep off surface water falling upon it or coming from adjacent lands, and for any consequent injury to other lands he would not be responsible; but that such waters as fell upon his own lands or came thereon by surface drainage, he must keep within the boundaries or permit them to flow off without artificial interference, unless within the limits of his own lands he could turn them into a natural watercourse.⁸⁵ Commenting upon this instruction, this court, through Commissioner Ryan, said: "In the latter part of this instruction it is barely possible that the court may have erred as against the defendant, in holding that it was the affirmative duty of the proprietor to keep within his boundary, or permit to flow off without interference, such waters as fall in rain or snow on his land or come there by surface drainage, unless within the limits of his own land he can turn them into a natural watercourse. It is unnecessary to determine this question." In many of the cases cited in the opinion the distinction was clearly drawn between a proper defense against surface water and a negligent defense. This case, then, merely established the general rule, but there was kept constantly in view the fact that no negligence appeared, and that the existence of negligence might be a controlling feature.

In *Lincoln Street R. R. Co. v. Adams*, 41 Neb. 737, while the rule was very briefly stated, in accordance with former opinions, that a proprietor may not collect surface waters on his own estate in a ditch and discharge them in a volume on the land of his neighbor, it is quite evident that the same principle was in view, and that this was deemed a negligent method of protecting one's self.

In *Anheuser-Busch etc. Assn. v. Peterson*, 41 Neb. 897, a proprietor, in order to protect himself against surface water, filled in his lots, but in such a manner that water which otherwise would have passed off in another direction accumulated and en-

tered the icehouse of plaintiff through a privy vault. The rule in *Morrissey v. Chicago etc. R. R. Co.*, 38 Neb. 406, was stated, and the court, through Judge Post, said: "Subject to that rule, every proprietor may lawfully improve his property by doing what is reasonably necessary for that purpose, and unless he is guilty of some act of negligence in the manner of its execution, he will not be answerable to his neighbor, although he may thereby cause the surface water to flow upon or from the premises of the latter to ⁸⁶ his damage. The injury in such case is but a mere incident to the proper use of the owner's property; but if in the execution of the enterprise in hand he is guilty of negligence which is the natural and proximate cause of injury to the adjoining proprietor, the law holds him accountable therefor. Such is the essence of the authorities cited in *Morrissey v. Chicago etc. R. R. Co.*, 38 Neb. 406, and undoubtedly the law of this case."

In *Bunderson v. Burlington etc. R. R. Co.*, 43 Neb. 545, it was held that the construction of a railroad embankment whereby water had been backed up upon the lands of a superior proprietor, was no cause of action, and this for the reason that to have made an opening or culvert would have discharged the water in a volume upon the lands of an inferior proprietor, which would have been tortious.

In *Lincoln etc. R. R. Co. v. Sutherland*, 44 Neb. 526, the railroad company was held liable because of its negligence in the construction of an embankment, and the words above quoted from *Anheuser-Busch etc. Assn. v. Peterson*, 41 Neb. 897, were quoted with approval as controlling the case.

In *Beatrice v. Leary*, 45 Neb. 149, 50 Am. St. Rep. 546, it was said: "The doctrine of this court is the rule of the common law, that surface water is a common enemy and that an owner may defend his premises against it by dike or embankment, and if damages result to adjoining proprietors by reason of such defense he is not liable therefor; but this rule is a general one and subject to another common-law rule, that a proprietor must so use his own property as not to unnecessarily and negligently injure his neighbor; and, therefore, every proprietor may lawfully improve his property by doing what is reasonably necessary for that purpose, and, unless guilty of some act of negligence in the manner of its execution, will not be answerable to an adjoining proprietor, although he may thereby cause the surface water to flow on the premises of the latter to his damage; but if in the execution of ⁸⁷ such enterprise he is guilty of negligence which is

the natural and proximate cause of injury to his neighbor, he is accountable therefor."

We think that the foregoing review of the cases shows that instead of there existing any conflict in the decisions, it has been the settled and uniform rule, applied in every case, that while one may protect his land from surface water, he is responsible for any negligence in so doing occasioning damage to his neighbor. The case is not different from the exercise of any other undoubted right. I have as much right to drive along the highway as I have to defend my land from surface water; but if I drive negligently and injure someone, I am responsible. We think, in view of this principle, the evidence amply sustained the finding and decree of the district court.

Judgment affirmed.

THE DEFLECTION OF SURFACE WATER, BY A COUNTY for the improvement of a highway, was considered, in connection with the power of eminent domain, by the same court, in *Churchill v. Beethe*, 48 Neb. 87, which was an action against the county commissioners of Johnson county and the overseer of a road district therein, to restrain the defendants from building a certain culvert across a highway, and from otherwise changing the natural course of surface water. It was recognized as law; that under the common-law rule prevailing in the state of Nebraska, a proprietor of lands may, by a proper use of, and improvement upon, them, deflect surface water, without being liable, in the absence of negligence, for consequent damage to his neighbor; that this principle is applicable to counties and municipalities exercising the right of eminent domain; that as against a private individual, there is a remedy by an action for damages, or by injunction, for an unlawful diversion of surface water; that a county or municipality, in the exercise of the right of eminent domain, may divert water in a manner which would be unlawful, if done by an individual, but must make just compensation for all damage inflicted; that for all injuries which may arise on account of the proper construction or future operation of an improvement, an adjoining proprietor must be compensated in the original condemnation proceedings; and that the owner of lands, adjoining a highway is entitled to compensation not only for such injuries as might result from the use of the land appropriate in its natural state, but for all which would result from a proper construction, improvement, and maintenance of the highway, taking into consideration such embankments, cuts, bridges, culverts, and ditches as shall be required or warranted for the purpose of a proper construction and maintenance. The highway in question had long been a public road, and, several years before the action was brought, an embankment, or fill, of two or three feet was made along the highway, which was on the west border of the plaintiff's land, for the purpose of improving the road. This was the embankment, or fill, complained of. It crossed a depression, or basin, in the surface of the land and operated as a sort of dam, whereby surface water was accumulated west of the highway, and so as to cover it at its lowest point. It was the purpose of the commissioners to avoid this inconvenience by placing a culvert at the low point, which would permit the water to flow beneath the high-

way and upon the plaintiff's land. The culvert might have been put in when the highway was first opened, notwithstanding any injury it would cause the plaintiff, the only condition in inflicting such damage upon him being that just compensation should be paid him therefor. But it was not done, and the fill and culvert appeared to be not only a proper, but apparently a necessary improvement, for the purpose of properly maintaining the highway. The court, therefore, held that no action would lie to enjoin the county from constructing the culvert across the highway. The plaintiff was entitled at the time the highway was originally constructed, to compensation for any injury to his lands which the construction of such culvert would have caused, and "it must be presumed," said the court, "that he received such compensation, or at least had an opportunity to receive it, when the highway was originally constructed. He is not entitled to any further condemnation proceedings. Much less is he entitled to a perpetual injunction to restrain such highway improvement."

SURFACE WATERS—RIGHT TO DISCHARGE.—Surface water is a common enemy and the owner may expel it from his premises; but he has no right to collect it, by means of ditches or otherwise, and discharge it, in a body, on the land of another, to the latter's damage. If he does so, he is liable for the injury sustained: Note to *Beatrice v. Leary*, 50 Am. St. Rep. 553; *Missouri Pac. Ry. Co. v. Keys*, 55 Kan. 205; 49 Am. St. Rep. 249, and note; *Rychlicki v. St. Louis*, 98 Mo. 497; 14 Am. St. Rep. 651; *Fremont etc. R. R. Co. v. Marley*, 25 Neb. 138; 13 Am. St. Rep. 482, and note.

SURFACE WATERS—INJUNCTION AGAINST DISCHARGE OF.—If surface waters are collected in ditches at the sides of a public highway, and those ditches are then united and their waters thrown on the land of a private proprietor, rendering it wet and untillable, he is entitled to maintain an action against the township, under whose authority the injury was inflicted, to enjoin its continuance: *Patoka Tp. v. Hopkins*, 181 Ind. 142; 31 Am. St. Rep. 417.

MACK v. DRUMMOND TOBACCO COMPANY.

[48 NEBRASKA, 897.]

SALES—CONTRACT CONSTRUED TO BE ONE OF SALE AND NOT OF AGENCY.—Language, in an agreement between a manufacturing company and a merchant, making him the agent of the company to sell its tobacco at such prices as it may direct, and providing that he is to be paid a certain commission on all sales made by him at the price fixed by the company, but that if he sells for less he is to have no commission, is not controlling, where the agreement requires a warranty that the merchant shall pay for all tobacco received by him from the company, and further provides that he is to execute and deliver his promissory notes, due in sixty days, for all tobacco furnished to him by the manufacturer. Such a contract is one of sale, and not a contract of agency for the sale of the manufacturer's goods, by the merchant, on commission, and tobacco furnished to him, under it, is his property, when he gives his notes in payment therefor.

Thomas D. Crane and Duffie, Crane & Van Dusen, for the appellants.

G. W. Shields and Curtis & Shields, for the appellee.

³⁹⁸ RAGAN, C. In August, 1889, G. H. Mack & Co. were tobacco dealers in the city of Omaha, Nebraska, and the Drummond Tobacco Company were tobacco dealers in the city of St. Louis, Missouri. On said date said parties entered into an agreement, in words and figures as follows:

"G. H. Mack & Co., Omaha, Nebraska: We hereby appoint you our agent to sell our tobacco at such prices as we may require and direct by our price cards as issued from time to time. Your compensation, until changed by us, inclusive of insurance and all other expenses, will be six cents per pound on sales of Natural Leaf and Five A., and three cents per pound on sales of Horse-shoe, J. T., and all other of our brands, provided you have not sold or otherwise parted with our tobacco at less than our prices; but your compensation may be increased at any time by us, and will always be uniform to our agents. In consideration of the above compensation you must warrant that every shipment made to you will be paid for. To make good your above warranty, we require you to send us your sixty-day note or acceptance for the amount of each invoice shipped to you, but if you are willing to make us advances in cash of the amount of any shipment, we will allow you, if remitted within ten days after shipment, two per cent for such cash as additional compensation, the advances to be entirely at the risk of your reimbursing yourselves out of the goods so shipped—you to insure all goods shipped in order to protect your above warranty or any cash advances made. We will settle with you every sixty days, but we will not pay you any compensation if you sell our goods at less ³⁹⁹ than our prices. We reserve the right to terminate this agency at any time at our option.

"DRUMMOND TOBACCO CO.,

"Per JOHN N. DRUMMOND,

"Vice Pres.

"The above terms for the sale of Drummond Tobacco Company's goods are accepted.

"G. H. MACK & CO.

"Omaha, August 9, '89."

In accordance with the provisions of this contract the Drummond Tobacco Company shipped a quantity of tobacco to Mack & Co., and the latter executed and delivered their promissory

notes due in sixty days to the tobacco company for the amount of the goods shipped. Mack & Co. pledged their tobacco stock, including certain tobacco which they had received under the contract above mentioned from the Drummond Tobacco Company, to certain of their creditors by chattel mortgages. The creditors took possession of the property pledged, and the Drummond Tobacco Company brought this, an action in replevin, against the mortgagees to recover the tobacco which it had shipped to Mack & Co. under the contract quoted above. The tobacco company had a verdict and judgment, and the mortgagees have prosecuted to this court a petition in error.

That the mortgages executed by Mack & Co. were made in good faith to secure debts owing by them to the several mortgagees is not a disputed question in this case. There are several assignments of error argued in the brief of counsel for the plaintiffs in error, but as we have reached the conclusion that the judgment under review is not supported by any evidence and is contrary to the law of the case, these errors will not be specifically considered. The sole question in the case is whether Mack & Co. were the owners of the tobacco received from the Drummond Tobacco Company under the contract quoted above and mortgaged to the plaintiffs in error, or whether such tobacco was the property of the Drummond Tobacco Company and was held by Mack & Co. as agents.

⁴⁰⁰ In *Fish v. Benedict*, 74 N. Y. 613, one Norton had given a written order to Fish Brothers for certain farm wagons at a certain price per wagon. The order further provided that Norton should pay for all wagons shipped him by Fish Brothers as soon as sold, and if sold on time he would indorse and forward the notes, with interest, and keep the wagons received under cover and insured, and that if any wagons remained unsold for twelve months after their receipt he would pay for the same. It was insisted that this order made Norton agent of Fish Brothers for the sale of the wagons shipped to him under such order, but the court of appeals held: "That the paper was an order for a purchase by the Nortons, and a sale by the plaintiffs, and was not a creation of an agency to sell on commission; that the title to the wagons was transferred to the Nortons, and plaintiffs [Fish Brothers] had no title or right of possession; and that the question as to the interpretation of the instrument was one of law only."

In *Kellam v. Brown*, 112 N. C. 451, the contract provided: 1. That Kellam would not sell his goods to another merchant in the town where Brown was in business; 2. In consideration of this

agreement on Kellam's part Brown agreed not to sell any spectacles or eye-glasses except the "Perfected Crystal Lenses" and other goods manufactured by Kellam; 3. Brown agreed to keep on hand one hundred dollars' worth of such spectacles and eye-glasses; 4. Brown agreed not to sell the spectacles at less than a price established by Kellam; 5. By the contract first signed Brown ordered one hundred dollars' worth of Kellam's goods. One-fifth of this amount was to be paid August 1, 1891, and a like sum on the first day of each month thereafter until full payment of the one hundred dollars; 6. All future goods ordered by Brown under the contract were to be paid for in sixty days from date of their receipt. It was insisted that this contract or agreement between Kellam and Brown was one of agency; that Brown was the agent of Kellam, and that the goods shipped to Brown under the contract by Kellam remained the property of ⁴⁰¹ Kellam, but the supreme court of North Carolina held: "The agreement between the parties is not such, as is contended by defendant, that it would constitute the defendant a factor or commission merchant—the agent of the plaintiffs for the sale of the goods mentioned—but clearly contemplates a sale."

In *Aspinwall Mfg. Co. v. Johnson*, 97 Mich. 531, the agreement recited: 1. That the manufacturing company had appointed Johnson agent for the sale of a potato planter in certain territory; 2. Johnson hereby orders of the manufacturing company one Aspinwall Potato Planter, sixty-five dollars, to be paid for in four months after May 1, 1891; 3. Johnson agreed to give his notes for all goods shipped to him under the contract by the manufacturing company when requested by it. The supreme court of Michigan, in construing this contract, said: "The order of the goods payable in four months after May 1, 1891, with the promise to give a note whenever requested, makes this a contract of purchase. The fact that the contract contains other undertakings does not change the character of this. The defendant secured to himself the right to sell these goods and to purchase at certain prices. In consideration he agreed to make an effort to sell the plaintiff's machines, but it requires the defendant to become the purchaser of such goods as he orders."

In *Peoria Mfg. Co. v. Lyons*, 153 Ill. 427, the contract between the manufacturing company and Lyons recited: 1. The manufacturing company agreed to deliver to Lyons such farm wagons, plows, and buggies as he might order on commission for the manufacturing company; 2. Lyons agreed to sell the goods received at retail prices, the difference between which and the man-

manufacturer's price was to constitute his compensation or commission for making the sale; 3. In case Lyons sold the wagons on credit and took notes for them, he must guaranty the notes and turn them over to the manufacturing company, and if said notes were not paid at ⁴⁰² maturity, Lyons was to pay them; 4. If Lyons sold the goods for cash he was to remit the cash to the manufacturing company; 5. Lyons was to give the manufacturing company his notes for the invoice price of all the goods shipped to him when the goods were received, and any cash or notes remitted by Lyons to the manufacturing company as the proceeds of the sale of wagons were to be applied upon the notes which Lyons had given to the manufacturing company for the goods shipped him. The supreme court of Illinois, in construing this contract, held that goods shipped by the manufacturing company to Lyons in pursuance of this contract were sold to Lyons; that he did not hold such goods as the agent of the manufacturing company. To the same effect, see *Braunn v. Keally*, 146 Pa. St. 519; 28 Am. St. Rep. 811.

Construing the contract between the Drummond Tobacco Company and Mack & Co. in the light of these authorities, we reach the conclusion that Mack & Co. were not the agents of the Drummond Tobacco Company, and that the tobacco shipped by the Drummond Tobacco Company to Mack & Co. in pursuance of the terms of this contract was sold by the tobacco company to Mack & Co., and became, on its acceptance and the giving of the notes for its price, the latter's property. It is true the contract under consideration recites that the Drummond Tobacco Company does hereby appoint Mack & Co. its agent to sell its tobacco, but this language is not controlling. Not only were Mack & Co. required by the agreement to guaranty the payment of the price of all tobacco shipped them by the tobacco company, but, in addition to that, on the receipt of a bill of goods, they were required to execute to the tobacco company their notes for the amount of the goods shipped, due in sixty days. If this did not constitute a sale, it is difficult to understand what would constitute one. We have not overlooked the case of the *National Cordage Co. v. Sims*, 44 Neb. 148, but the contract construed in that case was very different from the one under consideration here, ⁴⁰³ and the conclusion reached here does not in any manner conflict with the decision in the case last referred to. The judgment of the district court is reversed and the cause remanded.

Reversed and remanded.

SALE—WHAT CONSTITUTES.—A delivery of certain articles in consideration of being paid what they are worth constitutes a sale: *Hill v. Hill*, *Coxe*, 261; 1 Am. Dec. 206.

MOFFITT v. CARR.

[48 NEBRASKA, 408.]

PAYMENT—STATUTE OF LIMITATIONS—WHAT CONSTITUTES.—PART PAYMENT, within the meaning of a statute which does not say by whom, nor under what circumstances, a payment must have been made upon a note in order to arrest the running of the statute of limitations, is a voluntary payment, made by the debtor himself, or by some one authorized by him to make the payment.

PAYMENT—STATUTE OF LIMITATIONS—PART PAYMENT BY SALE OF PROPERTY ON EXECUTION OR OTHER LEGAL PROCESS.—A payment made on a debtor's note by the sale of his property on execution, or other legal process, is not such part payment by the debtor as will have the effect of arresting the running of the statute of limitations, under a statute which does not say by whom, nor under what circumstances, a payment must have been made upon a note in order to have that effect.

PAYMENT—STATUTE OF LIMITATIONS—PART PAYMENT BY INDORSEMENT, ON NOTE, OF PROCEEDS OF SALE OF MORTGAGED PREMISES.—If a trustee sells lands mortgaged by a trust deed to secure the payment of a note, the payment of the proceeds of the sale to the holder of the note, and the latter's indorsement of the payment on the note, is not, as to the mortgagor, such part payment on the note as will take it out of the operation of the statute of limitations.

Tiffany & Vinsonhaler, for the appellant.

Otis H. Ballou and James W. Carr, for the appellee.

⁴⁰⁴ **RAGAN, C.** In the state of Missouri, on the 26th of February, 1883, James W. Carr executed and delivered his certain promissory note to one Irene Moffitt, and to secure the payment of said note he executed a trust deed on certain real estate in Missouri to one George S. Baker as trustee. The trust deed provided that in case Carr should fail to pay his note according to its tenor, that upon the request of the holder of said note the trustee, or, in case of his absence, death, refusal to act, or disability in anywise, the then sheriff of Worth county, Missouri, should proceed to advertise the property for thirty days and sell it at public vendue and apply the proceeds of the sale toward the payment of the note. The note made by Carr matured on the 26th of February, 1886, and no part of the principal or interest of the note was ever paid by him afterward. On the sixteenth day of October, 1886, the sheriff of Worth county, after having duly advertised the real estate conveyed by the trust deed, sold it at public

vendue and paid the proceeds of the sale to the holder of the note, who indorsed the amount of the said proceeds thereon. Irene Moffitt brought this suit in the district court of Douglas county against Carr to recover ⁴⁰⁶ the amount of money remaining due on said note. Carr pleaded that he was, and had been for more than five years prior to the bringing of the suit, a resident and citizen of the state of Nebraska; that the cause of action on the note accrued more than five years before suit brought, and interposed and invoked the statute of limitations as a defense to the action. Moffitt replied that Carr had made a payment on the note within five years before suit brought. The payment referred to in the reply was the indorsement on the note of the proceeds of the sale of the real estate conveyed by the trust deed, which was sold on the 16th of October, 1886, as already stated. The jury, in obedience to an instruction of the district court, returned a verdict in favor of Carr, on which a judgment dismissing Moffitt's action was rendered, and she prosecutes here a petition in error.

Section 10 of the Code of Civil Procedure provides that an action on a contract or promise in writing must be brought within five years, and section 22 of the code provides: "In any cause founded on contract, when any part of the principal or interest shall have been paid, . . . an action may be brought in such case within the period prescribed for the same after such payment," etc. The present suit was brought on the 15th of October, 1891, or more than five years after the maturity of the note, and the defense of the statute of limitations is good, unless the credit of the proceeds of the sale of the lands conveyed by the trust deed, made on the note by the holder thereof on the 16th of October, 1886, was a payment on the note within the meaning of said section 22 of the Code of Civil Procedure. The sole question presented, then, is, Did the sale of the lands conveyed by the trust deed, the payment of proceeds of said sale to the holder of the note, and her crediting said note with said proceeds of the sale on the date thereof, amount to a payment on the note within the meaning of said section 22 of the Code of Civil Procedure?

In *Sornberger v. Lee*, 14 Neb. 193, 45 Am. Rep. 106, this court held: "The ⁴⁰⁶ receipt and indorsement on a promissory note by the holder of money realized from a collateral left with him by the maker for that purpose will remove the bar of the statute." We have not the slightest doubt of the correctness of that

holding; but the decision rests upon the correct principle that the debtor, by delivering to his creditor collateral notes, authorizing him to collect them and indorse the amount of the proceeds on the original note, thereby constituted the holder of the note his agent and everything that the holder did in the premises was, in effect, the act of the maker of the note. In other words, the transaction amounted to a voluntary payment on the note by the maker. To the same effect is *National State Bank v. Rowland*, 1 Colo. App. 468.

In *Whitney v. Chambers*, 17 Neb. 90, 52 Am. Rep. 398, this court held: "The payment of a dividend by the assignee of an insolvent debtor is not such a part payment as will, under section 22 of the code, take the residue of the debt out of the statutory limitation as against such debtor." This case is sustained by the great weight of authority, and it was decided and rests upon the principle that the sale of the property of the maker of the note by his assignee, and his application of the proceeds of such sale toward the payment of the note was not a voluntary payment made on the note by the maker, but was a payment in invitum. True, the assignee was in a sense the agent of the maker of the note, but the assignee was nevertheless an agent of the law, one of the instrumentalities provided by the law for disposing of the assets of the insolvent debtor and applying the proceeds thereof toward the payment of his debts. To the same effect are *Roscoe v. Hale*, 7 Gray, 274, *Stoddard v. Doane*, 7 Gray, 387, *Richardson v. Thomas*, 13 Gray, 381, 74 Am. Dec. 636, and *Battle v. Battle*, 116 N. C. 161.

In *Kallenbach v. Dickinson*, 100 Ill. 427, 39 Am. Rep. 47, the supreme court of Illinois held that a payment made by one joint⁴⁰⁷ maker of a promissory note would not arrest the running of the statute of limitations as against the other joint maker. The court said: "In order that Dickinson [one of the joint makers] shall be concluded by the payments of Wenzel [the other joint maker], it must be determined that Wenzel was Dickinson's agent, not only for the purpose of liquidating the note by payment, but also for the purpose of doing what in legal estimation is necessary to make a new promise that will remove the bar of the statute."

In *Hughes v. Boone*, 114 N. C. 54, the supreme court of North Carolina held: "A partial payment of a judgment made on execution does not interrupt the running of the statute of limitations." To the same effect, see *In re Raeder*, 167 Pa. St. 597.

The principle upon which the cases last cited rests is, that the payments were not voluntary payments made by the debtor, but if they were payments at all they were payments made involuntarily.

In *Harper v. Fairley*, 53 N. Y. 442, the court, in discussing the question under consideration, said: "A part payment, whether made before or after the debt is barred by the statute, does not revive the contract unless made by the debtor himself or by someone having authority to make a new promise on his behalf for the residue."

It is to be observed that section 22 of the Code of Civil Procedure does not say by whom nor under what circumstances a payment must have been made upon a note in order to arrest the running of the statute of limitations, but we think, both upon reason and authority, that part payment, within the meaning of said section of the code, is a voluntary payment made by the debtor himself or by someone authorized by him to make the payment; and that a payment made on a debtor's note by the sale of his property on execution, or under any legal process whatever, is not such part payment by the debtor as is declared by said section 22 of the code to have the effect of arresting the running of the statute of limitations. ⁴⁰⁸ Had the mortgage made by Carr conveyed lands in the state of Nebraska, had the mortgage been foreclosed, a judicial sale made of the premises, and proceeds of such sale indorsed upon the note in suit, it is quite clear that such indorsement would not have been a part payment on the note within the meaning of the code, and would not have arrested the running of the statute of limitations; but the trust deed made by Carr conveyed lands in the state of Missouri, and it was competent, under the laws of that state, for a trustee named in the deed of trust, on the request of the holder of the note to secure which the trust deed was given, to advertise the lands for thirty days and sell them to discharge the debt. The trustee, then, in making this sale of these lands in Missouri was as much an instrumentality of the law as would have been the sheriff of this state had the mortgage been made here and the lands sold here at a judicial sale. In other words, Carr has been divested of the title to his property by operation of law, and the indorsement upon the note in suit is not there because of any voluntary payment made by Carr, but there by operation of law.

In *Leach v. Asher*, 20 Mo. App. 656, one division of the court of appeals of the state of Missouri held that part payment by a

trustee from the proceeds of a trustee sale of part of a debt secured by the deed of trust did not have the effect of arresting the running of the statute of limitations, while in *Bender v. Markle*, 37 Mo. App. 234, another branch of the court of appeals of Missouri held exactly the reverse. We have not been referred to or been able to find any decision by the supreme court of Missouri upon the question under consideration; but *Campbell v. Baldwin*, 130 Mass. 199, is a case exactly in point, and there the court held: "If the assignee of a mortgage on real estate containing a power of sale sells the mortgaged premises, and after paying the expenses of the sale applies the balance to the mortgage debt, this does not operate as a part payment on the note so as to ⁴⁰⁰ take it out of the operation of the statute of limitations as to the mortgagor." In that case, as in the case at bar, the mortgagor had, after mortgaging his real estate, sold and conveyed it to another party, who had assumed and agreed to pay the mortgage. We reach the conclusion, therefore, that crediting the note in suit with the proceeds of the sale of the land conveyed by the trust deed was not a part payment on the note by Carr within the meaning of the statute; that such payment was not a voluntary one on the part of Carr, but one made in invitum and by operation of law, and that it did not arrest the running of the statute of limitations.

The judgment of the district court is right and is affirmed.

PAYMENT—WHAT IS NOT.—The allowance of the amount of a debt due from a guardian to his ward, upon the purchase price of property purchased by the ward's mother, is not a payment of the debt: *Slaughter v. Slaughter*, 7 Houst. 482, 484.

CALMELET v. SICHL.

[46 NEBRASKA, 505.]

PARTY WALLS—INCREASE OF HEIGHT—INJUNCTION. If a party wall is, by joint agreement between adjacent owners, erected to the height of three stories, thereby constituting the parties joint owners of the wall to the height of three stories, each party has, in the building of the other, a cross-easement which he is entitled to have protected. Hence, one of the parties may be restrained, by injunction, from a threatened trespass in putting up a fourth story, in his own right, for his own benefit, and in open hostility to the wishes of the other, especially where the height of the wall, owing to its insufficient thickness at the base, cannot be increased without danger of serious injury to the property of the other adjacent owner.

Edwin F. Warren, for the appellant.

John C. Watson, for the appellee.

⁵⁰⁷ RYAN, C. Plaintiff is the owner of a parcel of ground in Nebraska City having a north frontage on Main street of twenty-two feet, from whence said parcel extends southward ⁵⁰⁸ sixty feet. The land of defendant is contiguous to the west and south sides of this sixty foot tract. Originally, a remote grantor, through whom plaintiff derived title, built a one-story building on the west side of the tract above described as being owned by the plaintiff. The west wall of this building was entirely within and contiguous to the west line of said tract. Subsequently, in 1868, the defendant's grantor, who owned the land that was along the west and south sides of said parcel now owned by the plaintiff, but which at that time was owned by Marks Brothers, remote grantors of the plaintiff, made use of the west wall along plaintiff's present property in the construction of the Watson House to the height of three stories. Still later, plaintiff, having acquired his present parcel of land, replaced the one-story building thereon with another building two stories in height, for this purpose making use of the wall which had constituted the west side of his one-story building, and the required portion of this wall extended upward by defendant to make the Watson House three stories high. This change from a one to a two story building necessitated the closing with brick of eight windows in the prolonged upward wall of the Watson House. As the owner of the Watson House refused to pay for, or even to contribute to the expense of, closing these windows, plaintiff was compelled to pay the entire amount. There seems, however, to have been no objection interposed to this closing of these openings in the wall other than would naturally be expected by reason of the inconvenience caused. There was certainly no attempt to assert adverse conflicting rights, or as between Mr. Lindsay, the defendant's grantor, and Marks Brothers, who then owned plaintiff's present parcel of land, there does not appear from the evidence to have been any written contract under which the three-story wall of the Watson House was built; at least no one attempts to give the contents of such a contract or account for its whereabouts, nor even to say that such a writing was ever seen ⁵⁰⁹ or in existence. In 1891 the defendant was desirous of extending upward the walls of the Watson House to the height of an additional story, and was carrying his design into execution, when the plaintiff procured an injunction by which the completion of the work was stayed. It is claimed by plaintiff that before the commencement of this work he caused to be served upon the defendant a written notice to desist, but as no one testified to this

service, and the defendant denied it, we must assume that it was never given. After hearing on a motion to dissolve the injunction, said motion was sustained, and of this fact the defendant, having obtained the first knowledge, pushed his wall to completion before any further steps could be taken by plaintiff to prevent this being done. This was on June 13, 1891. On the tenth day of January, 1893, there was had a trial to the court, and on June 19th following, there was entered a decree dismissing plaintiff's petition, because, as the court found, it contained no equity. From the dismissal of his action and the taxation of costs against him the plaintiff appeals.

The petition recited plaintiff's title and all the above-described facts, which, as he claimed, entitled him to prevent the placing of a fourth story upon the wall of which his west side constituted the first story. There were averments of the insufficient thickness of the wall already in existence to sustain another story, but these we do not feel called upon to describe or discuss at great length. The answer contained a general denial, followed by these averments: "2. The said defendant . . . alleges that this defendant and his grantors have for twenty years last past been in open, notorious, peaceable, exclusive, and adverse possession of the property known as the Barnum House, or Watson Hotel, claiming the same as owners against the plaintiff and his grantors and all persons whomsoever; 3. The said defendant . . . further . . . alleges that during the spring of 1868 this defendant's grantor, ⁵¹⁰ Lindsay, for a full and valuable consideration, and in pursuance of a written agreement between Marks Brothers and said Lindsay, became a part owner of the division wall between this defendant and said plaintiff, and under and in pursuance of said agreement re-enforced and strengthened the foundation of said wall and entered at that time into the undisputed use and possession thereof, building the same two stories higher and putting windows in the said wall for the use of his hotel building on said premises, which said Lindsay was at that time enlarging and rebuilding; that the defendant is informed and believes that by and under the terms of said agreement said Lindsay became the owner of one undivided half of said wall, but that this defendant is unable to state the terms and conditions of said agreement, the same never having come into defendant's possession; that said Marks and Lindsay are both dead, and defendant knows of no one by whom he can establish the contents of said agreement; but this defendant then alleges that his grantor alleges that his grantor, Lindsay, entered into possession of said wall as

a joint owner of the same in the year 1868, and ever since, until he sold said premises to said defendant, used and occupied the same as the division and party wall between plaintiff and defendant, and that plaintiff has so used and occupied this said wall ever since his purchase of said premises from Lindsay, purchasing and paying for the same, and that this defendant is the owner of an undivided one-half of said wall entitled to all the rights and privileges of an equal owner of a party or division wall. Wherefore defendant prays that this action may be dismissed and that plaintiff recover nothing by his writ." There was a reply in which was denied each of the above copied averments of the answer.

The issues presented by the general denial contained in the answer have already been sufficiently covered for general purposes by the statement of the facts hereinbefore made. There are questions of law incidental to ⁵¹¹ these of fact, which, however, can scarcely be considered profitably, independently of other fact propositions stated in the answer. From the facts already stated it is evident that the averments that the defendant and his grantors have for more than twenty years been in the undisputed adverse possession of the Watson House have no bearing upon the right to increase the height of the wall having its foundation upon the plaintiff's land. The fact that this wall was built to a height of three stories in pursuance of a written agreement founded upon a sufficient valuable consideration, a part of which was the strengthening and re-enforcement of the foundation, would be very pertinent if the plaintiff was now seeking to procure the removal of that particular portion of the wall: *Barr v. Lamaster*, 48 Neb. 114. By the averments of the answer, however, this agreement was limited to the erection of the wall to the height of three stories; as to the proposed fourth story, the rights of the parties were as though no such written agreement had ever been made. The remainder of the answer was devoted to allegations showing a tenancy in common of the already constructed wall as between the plaintiff and the defendant. If, by a liberal construction, the averments as to possession of the Watson House for more than twenty years should be construed as a claim of title by virtue of the statute of limitations, the operation of this statute could not be possible as between tenants in common, for the rule as between tenants in possession is as stated in section 296 of *Buswell on Limitations and Adverse Possession*, that each of them has the entire possession as well of every part as of the whole, and the seisin and possession of one being *prima facie* the seisin and possession of the other, or others, one cannot

be disseised by another without an actual ouster. This rule was applied by this court in *Smith v. Hitchcock*, 38 Neb. 104. The averments that in 1868 the defendant's grantor became a joint owner of the wall, and that said ownership has ever since continued in the plaintiff, were limited to the wall three stories in height.

⁵¹² From the foregoing review of the answer it is clear that the defendant claimed and could assert no right except such as is necessarily implied by law from his interest in the three-story wall. As to the fourth story, this statute of limitations, as we have seen, is unavailable, and equally foreign is the plea that the defendant is the joint owner or tenant in common of the wall already constructed. The arrangement under which the wall was constructed, if, as alleged in the answer, it was under a written agreement, gave each party in the building of the other a cross easement in respect to which he was entitled to protection: *Barr v. Lamaster*, 48 Neb. 114. That courts have no power, however, to enlarge contract rights of parties requires no citation of authority to establish. It is, moreover, very clear that an easement for one purpose established by mere user cannot, by legal intendment, be extended to another purpose: *Ballard v. Dyson*, 1 Taunt. 279; *Atwater v. Bodfish*, 11 Gray, 150; *Holsman v. Boiling Spring Bleaching Co.*, 14 N. J. Eq. 335; *Burnham v. Kempton*, 44 N. H. 78; *Richardson v. Pond*, 15 Gray, 387; *Holmes v. Drew*, 7 Pick. 140; *Wright v. Moore*, 38 Ala. 593; 82 Am. Dec. 731; *Atkins v. Bordman*, 20 Pick. 291; *Price v. McConnell*, 27 Ill. 255. Each of these cases was decided upon the assumption of a grant, either express or implied, and from them the principle deducible which is applicable to the case at bar is, that the right to erect a fourth story cannot be implied from plaintiff's acquiescence in the erection upon the ground of the first, second, or third stories. Another application of the same principle is, that the erection of the first three stories having been jointly by agreement between the parties, whereby, as defendant alleged, they were constituted joint owners of the wall to the height of three stories, this did not justify one of these parties in putting up the fourth story in his own right, for his own benefit, and in open hostility to the wishes of the other joint partners: *Omaha etc. Ry. Co. v. Rickards*, 38 Neb. 847; *Gatling v. Lane*, 17 Neb. 80; *Haywood v. Thomas*, 17 Neb. 237. ⁵¹³ In any view which can be taken of this case the defendant, upon the facts pleaded in his answer, could not justify his right to build the fourth story above the three stories already erected on plain-

tiff's lot. The attempt to do this was an invasion of the plaintiff's legal rights, and if consummated would constitute a continuing trespass upon his property, which eventually would ripen into an easement, which consideration alone was deemed a sufficient ground for an injunction in *McCloskey v. Doherty*, 97 Ky. 300; citing *Poirier v. Fetter*, 20 Kan. 47; *Musselman v. Marquis*, 1 Bush, 463; 89 Am. Dec. 637; *Peak v. Hayden*, 3 Bush, 125.

In *Mendenhall v. Harrisburg Water Power Co.*, 27 Or. 38, the supreme court of Oregon held that an injunction would lie to prevent the widening of a ditch for a watercourse through plaintiff's land and the erection of a dam which would destroy plaintiff's ford, defendant having no legal right to either. The ground upon which this seems to have been placed was that from the nature of the excavation an injury to plaintiff's easement was likely to result. In support of the conclusion reached there were cited *Smith v. Gardner*, 12 Or. 221; 53 Am. Rep. 342; *Chicago etc. Ry. Co. v. Porter*, 72 Iowa, 426. In the case at bar, it was shown that the original foundation wall had been of the thickness of fifteen inches; that this had been re-enforced afterward by a wall twelve inches in thickness, and that from the top of the re-enforced wall the prolongation to the height of two stories was twelve inches in thickness, and from thence upward, inclusive of the fourth story, the wall is of the thickness of nine inches, and, by much evidence adduced by plaintiff, it was shown that from the fourth story being erected upon its narrow foundation as described, there are grounds for apprehending serious injuries to the property of the plaintiff. If the evidence is sufficient to sustain this contention, there can be no doubt that plaintiff is entitled to an injunction against the erection and continuance of the fourth story of the wall in question which threatens the ⁵¹⁴ safe enjoyment of his property.

The judgment of the district court is reversed, and this cause is remanded to said district court for further proceedings.

PARTY WALLS—INCREASE OF HEIGHT—INJUNCTION.—

Either owner may increase the height of a party wall, if it is strong enough, and no direct injury will result to the adjoining building; and he cannot be restrained from doing so by injunction: See monographic note to *Bloch v. Isham*, 92 Am. Dec. 295, on the law of party walls; note to *Everett v. Edwards*, 14 Am. St. Rep. 469. But the party making the addition does so at his peril; and, if injury results, he is liable for all damages. He must insure the safety of the operation: *Brooks v. Curtis*, 50 N. Y. 639; 10 Am. Rep. 545; note to *Negus v. Becker*, 42 Am. St. Rep. 729. Each owner of a party wall may build it higher, and use it as the lateral support of such house as he may desire to erect, so long as he does not impair the value of the wall to the other owner: Note to *Putzel v. Drovers'* etc. Nat.

Bank, 44 Am. St. Rep. 301. The remedy by injunction may be invoked to restrain acts, or threatened acts, of trespass in any instance where such acts are, or may be, an irreparable damage to the particular species of property involved: Kellogg v. King, 114 Cal. 378; 55 Am. St. Rep. 74. To sustain an action by one owner of a party wall against the other, the plaintiff must, at least, show some damage or detriment to himself in consequence: Everett v. Edwards, 149 Mass. 588; 14 Am. St. Rep. 462.

HAVEMEYER v. DAHN.

[48 NEBRASKA, 536.]

ACKNOWLEDGMENT.—A MORTGAGE UPON A HOMESTEAD is void, if the instrument is not acknowledged.

ACKNOWLEDGMENT, BY ATTORNEY, OF MORTGAGE MADE TO HIS CLIENT.—An attorney at law may, if he is a notary public lawfully take an acknowledgment of a mortgage made to his client, although he holds, for collection, the claim secured by such mortgage, where he has no beneficial interest in having the mortgage made, and the amount of his compensation does not depend upon the making of the instrument.

Lake, Hamilton & Maxwell, for the appellants.

William H. Crow and Joseph Crow, for the appellee.

⁵³⁶ **RAGAN, C.** John C. Havemeyer brought this suit in equity in the district court of Douglas county against Marcus Dahn and Barbara Dahn, his wife, to foreclose a real estate mortgage. A corporation known as the O. F. Davis Company and a copartnership known as Storz & Iler were also made defendants to the action. The latter two filed cross-petitions, by which they also sought to foreclose mortgages held by them upon the real estate of Dahn. By the decree of the district court, Havemeyer and the O. F. Davis Company were given liens upon the real estate as prayed for in their petition and cross-petition; but the district court denied the prayer of the cross-petition of Storz & Iler, and dismissed the same, and from this decree they have appealed.

⁵³⁷ It appears from the special findings of the district court that one Kopald was indebted to Storz & Iler, and as an evidence of this indebtedness he executed to them his note, and this note was signed by the appellee, Marcus Dahn, and a note secured by a mortgage upon the homestead of Dahn and wife to Storz & Iler. The notary public who took the acknowledgment of this mortgage was an attorney at law, and the attorney and agent of Storz & Iler for the purpose of collecting the debt owing to them from Kopald, and procured Dahn and his wife, as they alleged,

by fraud and false representations, to execute the mortgage. The learned district court was of opinion that because the notary public who took this acknowledgment was the agent and attorney of the mortgagee, he was therefore disqualified to take the acknowledgment, and the mortgage being upon a homestead was void. In *Horbach v. Tyrrell*, 48 Neb. 514, handed down at this sitting of the court, we decided that a notary public was not disqualified from taking an acknowledgment of a mortgage made to a corporation of which he was secretary and treasurer, it not appearing that he was a stockholder in such corporation or otherwise beneficially interested in having the conveyance made. In the case at bar it is not found that the notary and attorney who took the acknowledgment of Dahn and his wife had any beneficial interest in having the mortgage made. It is true that he was agent and attorney for Storz & Iler, but it does not appear that the amount of his compensation in any manner depended upon his procuring this mortgage or collecting the debt which it represented. Following *Herbach v. Tyrrell*, 48 Neb. 514, the decree appealed from is reversed and the cause remanded to the district court for further proceedings.

Irvine, C., not sitting.

Ryan, C., dissents.

ACKNOWLEDGMENT.—DEED OR MORTGAGE of homestead, without the wife's signature and acknowledgment, as required by statute, is a nullity: *Smith v. Pearce*, 85 Ala. 264; 7 Am. St. Rep. 44; *Alt v. Banholzer*, 39 Minn. 511; 12 Am. St. Rep. 681, and note.

THE DISQUALIFICATION OF AN OFFICER FROM TAKING AN ACKNOWLEDGMENT, by reason of his relationship or interest, was considered in *Horbach v. Tyrrell*, 48 Neb. 514, where a notary public took an acknowledgment of a mortgage made to a corporation of which he was, at the time, secretary and treasurer, and where it did not appear that he was a stockholder in such corporation, or otherwise beneficially interested in having the mortgage made. The mere fact that one is shown to be secretary and treasurer of a corporation was there held not to authorize the presumption that he is a stockholder of such corporation, and it was considered that the notary was not disqualified from taking the acknowledgment. The real estate conveyed by the mortgage was the homestead of a husband and wife, the mortgagors. The statute of Nebraska, section 4 of chapter 36 of the Compiled Statutes of 1896, reads as follows: "The homestead of a married person cannot be conveyed or encumbered, unless the instrument by which it is conveyed or encumbered is executed and acknowledged by both husband and wife"; and "the obvious purpose of this statute," said the court, "is to render all conveyances or encumbrances made of a homestead absolutely void, unless such conveyances are not only signed and witnessed, but acknowledged by both the husband and the wife." It therefore followed that the mortgage in question was

void, even as between the parties thereto, if it was not duly acknowledged; that is, if the officer who took the acknowledgment of the grantors therein was disqualified from taking such acknowledgment.

The court then proceeded to consider the character or capacity in which an officer acts in taking the acknowledgment of a grantor to a conveyance of real estate; whether judicial or ministerial. It could find no statute declaring the act to be a judicial one, and, among the decisions, there was found to be a conflict of authority upon the question. The following authorities were cited as showing that such an act is judicial: *Griffith v. Ventress*, 91 Ala. 366; 24 Am. St. Rep. 918; *Wedel v. Herman*, 59 Cal. 507; *Stevens v. Hampton*, 46 Mo. 404; *Long v. Crews*, 113 N. C. 256; *Cover v. Manaway*, 115 Pa. St. 338; 2 Am. St. Rep. 552; *Bowden v. Parrish*, 86 Va. 67; 19 Am. St. Rep. 873; *Pickens v. Knisely*, 29 W. Va. 1; 6 Am. St. Rep. 622; *Johnston v. Wallace*, 53 Miss. 331; 24 Am. Rep. 699; *White v. Connelly*, 105 N. C. 65; *Calumet etc. Dock Co. v. Russell*, 68 Ill. 426; *Kerr v. Russell*, 69 Ill. 666; 18 Am. Rep. 634; the following case was cited as showing such act to be quasi judicial: *Wasson v. Connor*, 54 Miss. 351; and the following authorities were cited as holding that such an act is a ministerial one: *Elliott v. Peirsol*, 1 Pet. 328; *Hill v. Bacon*, 43 Ill. 477; *Beuley v. Curtis*, 92 Ky. 505; *Gibson v. Norway Sav. Bank*, 69 Me. 579; *Scanlan v. Wright*, 13 Pick. 523; 25 Am. Dec. 344; *Bank of Benson v. Hove*, 45 Minn. 40; *Truman v. Lore*, 14 Ohio St. 144; *Williamson v. Carskadden*, 36 Ohio St. 664; *Lewis v. Waters*, 3 Har. & McH. 430; *People v. Bartels*, 138 Ill. 322. "The conflict in the authorities," said the court, "is probably due to the peculiar statutes of the various states on the subject of acknowledgments." It seems from what is said in *Horbach v. Tyrrell*, 48 Neb. 514, that the doctrine that the taking of an acknowledgment is a judicial act had its origin in the consideration of acknowledgments by married women, where the officer is required to make a privy examination of the wife separate and apart from her husband, to find out whether she executed the conveyance voluntarily, freely, and without compulsion of her husband, and to make a certificate accordingly; and that, as applied to such cases, the doctrine is sound; but that it is otherwise where the statutes of the state require nothing more of a married woman than is required of her husband to make a conveyance effectual. After reviewing a number of Illinois statutes relative to acknowledgments of married women, the court said, with reference to the laws of Nebraska: "All that is required of either a husband or wife is that they shall sign the conveyance, that it shall be witnessed, and that they shall acknowledge the signing of the instrument to be their voluntary act and deed. If the real estate described in the conveyance is a homestead, then it must be not only signed and witnessed, but it must be acknowledged, in order to be good even between the parties; and if not a homestead, the conveyance, if signed, witnessed, and delivered, will pass the title between the parties. We think that the weight of authority is to the effect that the act of an officer in taking the acknowledgment of a grantor to a conveyance of real estate is a mere ministerial act."

The next question considered by the court was, What interest and what relationship possessed by an officer disqualifies him from taking an acknowledgment of a conveyance of real estate? "We have not been cited," said the court, "to any authority, nor have we been able to find one, which lays down, or attempts to lay down, any rule which will afford, in all cases, a safe test for determining whether an officer is disqualified by reason of his relationship or interest from taking an acknowledgment in any particular case. Whether such disqualification exists in any case must be determined

from the peculiar facts and circumstances of that case. No statute exists in this state which prescribes what relationship or interest of an officer shall disqualify him from taking an acknowledgment in any given case; but it would seem that on grounds of public policy an officer should be disqualified from taking an acknowledgment whose direct and beneficial interest would be subserved in having the conveyance made which he acknowledged. And perhaps it may be said, as a very general proposition, that an officer who is a party to a conveyance or interested therein is disqualified from taking the acknowledgment of the grantor. What relationship and what interest disqualifies an officer from taking an acknowledgment has been many times considered by the courts, as an examination of the following authorities will show."

The court then cited many cases to show the futility of any attempt to lay down a general rule upon the subject. These cases are cited in the monographic note to *Cooper v. Hamilton*, 56 Am. St. Rep. 798-803, on interest of officer disqualifying him from taking acknowledgments.

BROTHERTON v. MANHATTAN BEACH IMPROVEMENT COMPANY.

[48 NEBRASKA, 568.]

NEGLIGENCE IS THE FAILURE to exercise such care, prudence, and forethought as duty, under the circumstances, requires should be given and exercised. It is the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or the doing of something which a prudent and reasonable man would not do.

NEGLIGENCE IS A QUESTION FOR THE JURY where the facts are disputed, or where, from the undisputed facts, different minds may reasonably draw different conclusions as to the existence of negligence.

NEGLIGENCE—PROXIMATE CAUSE.—A cause of action for negligence is not made out without proving that the negligence charged was the proximate cause of the injury.

NEGLIGENCE—LIABILITY OF BATHHOUSE KEEPERS.—Although a patron of a bathing establishment may, by his own negligence, place himself in such a situation that his life is in danger, yet, if the bathhouse keeper, after becoming aware of such fact, fails to take reasonable precautions to avert such danger, he is liable for the resulting injury.

NEGLIGENCE—DUTY OF BATHHOUSE KEEPERS.—A company conducting a bathing resort, frequented by thousands of people every month, and letting out its privileges to the public for hire, is bound to exercise ordinary prudence and care for the safety of bathers, and should keep some one on duty to supervise them, and to rescue any one apparently in danger; but whether or not proper precautions have been taken is, ordinarily, a question of fact, which ought to be submitted to a jury.

NEGLIGENCE OF BATHHOUSE KEEPER—DIRECTION TO FIND FOR DEFENDANT, WHEN ERRONEOUS.—When a bathhouse keeper is notified of a bather's disappearance so soon thereafter as to justify a reasonable inference that an immediate search in the water would result in rescue before death, and has no one present to attempt the rescue, and fails to make immediate search in

the water for the missing bather, it is error, in an action to recover damages on account of the death, to direct the jury to return a verdict for the defendant.

B. C. Burbank, for the appellant.

Gregory, Day & Day, for the appellee.

565 IRVINE, C. This was an action under chapter 21 of the Compiled Statutes, by Abigail A. Brotherton, as administratrix of her son, Hiram Brotherton, to recover damages on account of the death of her intestate, alleged to have been caused by the defendant's negligence. At the close of the evidence the district court directed the jury to return a verdict for the defendant. The correctness of this instruction is presented for review.

The evidence discloses that Brotherton, a youth seventeen years of age, together with one Campion, a youth of about the same age, both residing in Omaha, went together on the eighth day of August, 1892, to Lake Manawa, a summer resort in Pottawattamie county, Iowa. There is on the shore of this lake an establishment maintained by the defendant company for the purpose of affording facilities to bathers. There are bath-houses, toboggan slides in the water, a platform for diving, and it seems, also, certain other resorts on the shore, such as a restaurant, a photograph gallery, and a shooting gallery. The privileges of these facilities are let out to the public by the defendant company for hire. Brotherton and Campion arrived at the beach about 4 o'clock in the afternoon, paid the customary fee for bathing privileges, donned bathing suits, and entered the water. Campion seems to have been very expert as a swimmer; Brotherton was able to swim, but was not expert. They remained in the **566** water not less than half an hour, and perhaps more than three-quarters of an hour, and were together most of the time. Finally Campion returned to the bath-house, believing that Brotherton had preceded him. Not finding him there, he made inquiry, and, learning that he had not returned, went back to the lake and searched for him among the bathers. He was not found, and his loss was again reported. This resulted in a search through which his dead body was discovered, about 10 o'clock that night, at the bottom of the lake. The plaintiff alleged negligence on the part of the defendant in failing to provide suitable guards and notices whereby the depth of the water should be indicated, in failing to provide proper management to superintend bathing, and in failing to provide means for resuscitating persons overcome by strangulation or otherwise while in the water; also, in failing

to maintain appliances to avoid drowning and for the purpose of resuscitation. Further, that no person was present on behalf of the defendant to search for or recover Brotherton immediately upon his disappearance from the surface of the water. These averments of negligence are more specific in the petition than we have given them here; but what we have said in a general way covers the averments.

Except on one point, we think the facts were such as to fully warrant the action of the trial court. There is evidence tending to show that, proceeding from the shore outward, the water was for more than one hundred feet comparatively shallow. Through this shallow water extended the diving platform referred to. In it were also constructed two toboggan slides. A few feet beyond the end of the platform and the outer toboggan slide there is evidence tending to show that there was a sudden deepening of the water; so that in the course of a very few steps it deepened from five or six feet to fifteen or twenty. Brotherton's body was found in this deep water. There was on the outer toboggan slide a sign as follows: "Dangerous! Keep Off Unless You Can Swim!" This manifestly ^{was} referred to the toboggan slide and to nothing else. There were no life-lines and no other signs to warn swimmers of the depth of the water. In a proper case the failure of persons maintaining a public bathing place to protect their patrons by suitable lines or warnings might afford a ground of recovery in case of injury. But there is absolutely nothing in the evidence to show that Brotherton's death was in any manner due to the failure of the company to provide such safeguards. There is no evidence whatever touching the circumstances of his drowning. He and Campion had twice, at least, swam out from the outer toboggan slide into the deep water. There is nothing to show that Brotherton was not aware of the depth of the water. They had returned, and when Brotherton was last seen by any witness it was by Campion himself, who testifies that they were standing near the platform at a point where the water was about knee deep. Campion's attention was then distracted by a conversation among other bathers near by. He proceeded thence to the bath-house, thinking that Brotherton had preceded him. How Brotherton got back into the deep water and what occurred there is not revealed by any evidence. It is not sufficient to establish a case for the plaintiff that negligence should be proved on the part of the defendant, but it must also appear that the negligence proved was the proximate cause of the injury. So far we have nothing, unless we indulge in conjecture absolutely unfounded on any

facts established, to show that the failure of the company to provide life-lines at the boundary of the shallow water and danger signals beyond them had any connection whatever with Brotherton's death.

But we think that there was evidence relevant to the issues in regard to subsequent facts which should have been submitted to the jury. Even though the defendant had not been in anywise negligent in providing facilities for the bathers, and although the deceased, by his own negligence, may have placed himself in such a situation ^{see} that his life was in danger, still, if the company, after becoming aware of such facts, was guilty of negligence but for which Brotherton's life would not have been lost, it was still liable. One of the allegations of negligence is, that the company did not have present any person or persons superintending the bathing, or to search for and recover Brotherton upon his disappearance from the surface. Campion's testimony is, that after leaving Brotherton he went immediately to the bath-house on the shore, and on discovering that Brotherton had not preceded him he at once notified the person in charge of the bath-house of the facts. Instead of immediately instituting a search upon the water, this person advised Campion to look in the photograph gallery and in a saloon on the shore. Campion knew from Brotherton's habits that he would not be in the saloon. He did look elsewhere on the shore and then returned to the water and began diving, if his own testimony is to be believed, searching for the body; and for some time no effort was made by any of the company's employes to search in the water. Negligence is the failure to exercise such care, prudence, and forethought as under the circumstances duty requires should be given and exercised. It is the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do: *Foxworthy v. Hastings*, 23 Neb. 772. As has been repeatedly said, the existence of negligence is generally a question of fact. It is for the jury to determine, where the facts are disputed, or where, from the undisputed facts, different minds may reasonably draw different conclusions as to the existence of negligence. This company was engaged in the business of carrying on a bathing resort. It let out for hire the privileges of that resort. The evidence tends to show that for several years it was frequented during the bathing season by an average of ten thousand bathers a month. It is disclosed that the company ^{see} kept at the beach a boat for the express purpose

of use in case of accident to bathers; but there does not seem to have been anyone whose duty it was to watch over the bathers or to rescue those in danger. In this case notice was brought home to an agent of the company, close to the shore, that a bather was missing, by Campion's inquiry upon entering the bath-house. Campion says that he told this man that he was unable to find Brotherton two minutes from the time he left the latter. Campion may have mistaken the time; but we have evidence other than his own estimate. From the testimony as to the depth of the water, coupled with the testimony of Campion that when he last saw Brotherton they were standing in water knee deep, it would seem that Brotherton must have proceeded out into the lake about seventy-five feet before he got beyond his depth. Campion must then have been on the way to the bath-house. Assuming Campion's testimony to be true, the proof rises to a moral certainty that when Campion first disclosed Brotherton's absence, the latter could not have been dead. Assuming again the truth of Campion's testimony, instead of at once taking measures to search for Brotherton in the water, where he was last seen and where the danger existed, no search whatever was made by the company, and their direction to Campion was to search on the shore, where no danger was to be apprehended. We think that it is a reasonable inference that persons of ordinary prudence conducting a bathing resort, frequented by ten thousand people a month, should, in the exercise of ordinary care, keep someone on duty to supervise bathers and rescue any apparently in danger; and, if not, then it is certainly a reasonable inference that persons so situated should, on ascertaining that a person last seen in the water is missing, without a moment's delay exert every effort to search for that person in the water, and not merely advise a youthful companion of the missing person to search on the land and coolly watch the result of such search. We think in this aspect ⁵⁷⁰ of the case, and this only, the evidence presented an issue which should have been submitted to the jury, and for that reason the peremptory instruction was erroneous.

Out of abundance of caution it may be well to repeat that our comments on the evidence have been based upon that theory of it most favorable to the plaintiff, as is required by the manner in which the case is presented. The evidence upon the vital points was conflicting. It was for the jury, and no more for this court than for the district court, to pass upon; and we are expressing no opinion whatever in regard to the weight of conflicting evidence, or even as to the inference which the jury should draw from un-

disputed facts. We merely hold that the evidence, viewed in one light, justified an inference favorable to the plaintiff, should the jury draw such inference.

Reversed and remanded.

NEGLIGENCE is a failure to do what a reasonable and prudent person would ordinarily have done under the circumstances, or doing what such a person would not have done under the circumstances. In a legal sense, it is no more than the failure to observe, for the protection of another person, that degree of care, precaution, and vigilance which the circumstances demand, whereby such other person suffers injury: Note to Huber v. La Crosse City Ry. Co., 53 Am. St. Rep. 945. If fair-minded men might reasonably draw different conclusions from the facts which the evidence tends to prove, the question of negligence is for the jury; otherwise, it is for the court; Note to Lowe v. Salt Lake City, 57 Am. St. Rep. 713. The consequence for which a negligent person is answerable must be the natural result of the alleged negligent act, or one which might reasonably have been anticipated: Note to Huber v. La Crosse City Ry. Co., 53 Am. St. Rep. 945. The proximate and not the remote cause of injury is regarded in cases of negligence; Lackawanna etc. R. R. Co. v. Chenewith, 52 Pa. St. 382; 91 Am. Dec. 168. Although a party, injured by the negligence of another, is negligent himself in the first instance, such negligence will not defeat his right of action, where it is shown that the defendant might have avoided the injury by the exercise of ordinary care and reasonable prudence; and the question as to whose negligence was the proximate cause of the injury is one of fact for the jury to determine under the circumstances of each particular case: Hall v. Ogden City Street Ry. Co., 13 Utah, 243; 57 Am. St. Rep. 728.

TRIAL—DIRECTION TO FIND FOR DEFENDANT.—When the evidence, with all justifiable inferences to be drawn from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the court may direct a verdict for the defendant: Note to Hite v. Metropolitan Street Ry. Co., 51 Am. St. Rep. 561; Schuermann v. Dwelling House Ins. Co., 161 Ill. 437; 52 Am. St. Rep. 377. But the court has no power to direct a verdict where there is some evidence to support the cause of action or defense: Moore v. Baker, 4 Ind. App. 115; 51 Am. St. Rep. 203, and note.

CRAM v. COTRELL.

[48 NEBRASKA, 646.]

MORTGAGES—EFFECT OF ASSIGNING ONE OF SEVERAL SECURED NOTES.—The transfer of a note secured by mortgage transfers the mortgage security to the purchaser without any assignment of the mortgage itself; and where there are several notes secured by the same mortgage the assignment of one of the notes is an assignment of a proportionate interest in the mortgage.

MORTGAGES—ASSIGNMENT OF SECURED NOTE—RIGHTS OF PURCHASER.—If a note secured by mortgage has been assigned, a purchaser of the mortgaged premises, in good faith, without notice of the assignment, will be protected by a release of the mortgage executed by the original mortgagee.

PARTIES—NOTICE OF SUIT.—The mere fact that one has notice of the pendency of a foreclosure suit does not make him a party thereto, or make the decree binding upon him.

MORTGAGES—RIGHT OF JUNIOR MORTGAGEE TO REDEEM.—A junior mortgagee who has not been made a party to a proceeding foreclosing a senior mortgage is entitled to redeem the property sold at a judicial sale under such foreclosure; and his right of redemption, in such a case, is one of right, which a court cannot deny on the ground that its exercise would be unprofitable.

MORTGAGES—REDEMPTION—CREDIT FOR IMPROVEMENTS—WHO IS NOT A BONA FIDE PURCHASER.—If a purchaser at a judicial sale buys in good faith, believing that he is getting a perfect title, he is entitled, upon a redemption of the property, to a credit for improvements made thereon; but one who buys property sold under foreclosure proceedings, with notice of the facts, is not a purchaser in good faith, and is not entitled to such credit.

W. W. Stowell, for the appellants.

A. J. Evans and E. W. Hale, for the appellees.

⁶⁴⁶ IRVINE, C. Prior to June, 1890, Nathan B. Cotrell was the owner of a certain lot in David City, upon which there was a ⁶⁴⁷ mortgage in favor of William Stoddard. In June, 1890, Cotrell conveyed the premises to Catherine Neihardt, she and her husband executing as part of the purchase price three notes, and a mortgage securing such notes upon the same premises. In August, Cotrell sold one of the notes to Cram and Myatt. In December, Catherine Neihardt sold the property to Sylvester Youker. In connection with this transaction the Neihardts executed a conveyance of the property to Youker, December 11th. On the same day Cotrell entered a marginal release of his mortgage. Youker executed a mortgage for fifteen hundred dollars to the Security Savings Bank, and Stoddard released his first mortgage and took another, junior to that of the savings bank, for nine hundred dollars. Cram and Myatt then began this action against Cotrell, Youker, Stoddard, and the savings bank, setting up that at the time of the transactions referred to Youker and Stoddard knew that the plaintiffs were the owners of one of the Cotrell notes and that Cotrell had no authority to release the mortgage, and praying that the release be canceled in so far as it affected the plaintiffs' interest, and for general relief. It is not contended that the savings bank had any notice of the plaintiffs' rights, and it was conceded that its mortgage was superior to plaintiffs. A default was entered against all the defendants, but no decree rendered thereon. Subsequently Stoddard appeared, and on his motion the default as to him was set aside and he was permitted to answer. The answer put in issue the claim of the plaintiffs; denied that Stoddard had any notice of their in-

terest in the mortgage, and alleged that Stoddar released his former mortgage and took the latter one relying upon Cotrell's release of record. Subsequently Stoddar filed a supplemental answer alleging that since the filing of his former answer his mortgage had been foreclosed and that he had purchased the mortgaged premises at the foreclosure sale and had later conveyed the same to his wife; that at the sale the premises did not bring enough to satisfy his mortgage; that the improvements had prior to the ⁶⁴⁵ foreclosure been destroyed by fire, and that since purchasing the property Stoddar had expended two thousand dollars in the erection of a hotel thereon; that the plaintiffs had notice of the pendency of said foreclosure proceedings and of said sale. There was a reply to this supplemental answer, but it is not necessary here to set it forth. The court found the issues in favor of Stoddar and dismissed the case. Plaintiffs appeal.

It is elementary law that the transfer of a note secured by mortgage transfers the mortgage security to the purchaser without any assignment of the mortgage itself, and that where there are several notes secured by the same mortgage the assignment of one of the notes is an assignment of a proportionate interest in the mortgage: *Webb v. Hoselton*, 4 Neb. 308; 19 Am. Rep. 638; *Studebaker Bros. Mfg. Co. v. McCargur*, 20 Neb. 500. By the assignment of one of the three notes by Cotrell to the plaintiffs they therefore became entitled to the benefits of the mortgage, and Cotrell was, after the assignment, without any authority to release the mortgage so as to deprive plaintiffs of their security. Nevertheless, the entry of satisfaction by the original mortgagee will protect a subsequent mortgagee in good faith without notice of the fact that the debt was assigned or the release unauthorized: *Whipple v. Fowler*, 41 Neb. 675; *Mathews v. Jones*, 47 Neb. 616. In the case cited certain earlier cases which might be taken to imply a different rule were distinguished. In addition to those cases the case of *Bridges v. Bidwell*, 20 Neb. 185, seems to afford some color to a contrary rule; but in that case the mortgage remained of record unsatisfied, and a third person, with such mortgage standing unsatisfied of record, took a joint conveyance from the mortgagor and the mortgagee. It is quite evident that the case proceeded upon the ground that the purchaser was charged with notice of the assignee's rights from the fact that the mortgage appeared of record unsatisfied. We think, therefore, that the rule in *Whipple v. Fowler*, 41 Neb. 675, is not in conflict with any other decisions and it should be adhered ⁶⁴⁹ to. The question whether Stoddar at the time he took

his second mortgage did so in good faith, without notice of the plaintiffs' rights or Cotrell's want of authority, is, therefore, the controlling question as to the relative priority of his and plaintiffs' mortgage. The court found in favor of Stoddard, and while from a review of the evidence it seems to the writer that this finding was not in accordance with the preponderance of proof, still the evidence was conflicting, and in view of the superior facilities possessed by the trial court for weighing the evidence and the firmly established rule of this court, the finding cannot be disturbed. It does not follow, however, that the court was justified in dismissing the case. The plaintiffs' cause of action stood confessed by all the defendants except Stoddard, and it is quite clear that but for the facts set up in the supplemental answer the plaintiffs were entitled to a decree re-establishing the Cotrell mortgage as security to the plaintiff's note, but junior to the Stoddard mortgage.

The plaintiffs complain that the court erred in permitting the supplemental answer to be filed. There was no error in this, because while the facts therein set up constituted no defense to the action, they did, as will now be stated, require the relief granted plaintiffs to be different from that which should have been granted in the absence of such facts. The plaintiffs urge that there was no proof offered in support of some of the averments of the supplemental answer; but the reply thereto, either by a failure to deny or by negatives pregnant, admits all the essential averments. The plaintiffs were not made parties to the foreclosure suit, and were not bound by those proceedings. The mere fact that they had notice of its pendency did not make them parties or bind them by the decree. This is elementary. The foreclosure and sale were therefore utterly ineffectual to bar plaintiffs' mortgage. A junior mortgagee who has not been made a party to the proceeding foreclosing the senior mortgage has thereafter a right to redeem from such senior mortgage: ⁶⁵⁰ Renard v. Brown, 7 Neb. 449. Therefore when this foreclosure was properly pleaded in the present case, the facts demanded that the plaintiffs, instead of merely having their mortgage re-established, should be permitted to redeem the Stoddard mortgage. Why the court denied this relief and denied plaintiffs any relief the record does not inform us. It is, however, argued in support of the action of the trial court that the proof showed that the land had not sold for sufficient at the foreclosure sale to pay the Stoddard mortgage, and that in order to redeem the plaintiffs would not only be compelled to discharge this mortgage, but would also be compelled to reimburse

Stoddard for the improvements made upon the land. To this argument there are at least two answers. In the first place the plaintiffs had a legal right to redeem, whether or not the exercise of that right would be profitable to them. It was for them to determine whether they should exercise the right, and not for the court to deny them the right, because in its opinion its exercise would not be profitable. In the second place, it is not true in this case that in redeeming Stoddard would be entitled to a credit for the improvements made by him. The case of Higginbottom v. Benson, 24 Neb. 461, 8 Am. St. Rep. 211, relied upon by Stoddard as supporting that position, was a very different case. The rule there laid down was that where the purchaser at a judicial sale bought in good faith, believing he was getting a perfect title, he would be entitled to a credit for the improvements. Stoddard was not a purchaser in good faith within the meaning of this rule. If he did not know of plaintiffs' rights when he took the mortgage, he learned them within a very few days thereafter. At the time of the foreclosure sale this very suit was pending in which he is a party. He had full notice of all the facts. A mistake of law would not protect him.

The judgment of the district court is reversed and the cause remanded, with directions to take an account of the amount due upon the Stoddard mortgage and to permit the plaintiffs to redeem.

Reversed and remanded.

MORTGAGES—ASSIGNMENT.—If a mortgage secures several notes, the assignment of one of them is an assignment, pro tanto, of the mortgage: *State Bank v. Mathews*, 45 Neb. 659; 50 Am. St. Rep. 565.

MORTGAGES—RIGHT OF JUNIOR MORTGAGEE TO REDEEM.—A junior mortgagee may redeem from a sale on a senior mortgage, where he was not made a party to the foreclosure suit, without paying the costs of such suit: *Gaskell v. Viquesney*, 122 Ind. 244; 17 Am. St. Rep. 364. See *Anson v. Anson*, 20 Iowa, 55; 89 Am. Dec. 514, and note.

MORTGAGES — REDEMPTION — CREDIT FOR IMPROVEMENTS—WHO IS NOT A BONA FIDE PURCHASER.—A purchaser in good faith of real estate at a judicial sale, after the foreclosure of a senior mortgage, is entitled to credit for improvements as against junior mortgagees, although the latter were not made parties to the foreclosure suit: *Higginbottom v. Benson*, 24 Neb. 461; 8 Am. St. Rep. 211. A purchaser under a foreclosure sale will be allowed for improvements made by him upon the premises, less the rents and profits which he has enjoyed, upon redemption, where he not only supposed he had a good title and made the improvements in good faith, but the redemptioner stood by seeing the expenditures, and maintaining the profoundest silence as to his right to redeem: *Bradley v. Snyder*, 14 Ill. 263; 58 Am. Dec. 564. A purchaser having sufficient notice to put him on inquiry is not a bona fide purchaser: *Durell v. Haley*, 1 Paige, 492; 19 Am. Dec. 444.

HANOVER FIRE INSURANCE COMPANY v. BOHN.

[48 NEBRASKA, 743.]

INSURANCE—"MORTGAGE CLAUSE" AS AN INDEPENDENT CONTRACT.—A "mortgage clause," in a policy of fire insurance, making the loss payable to a mortgagee of the insured property, and providing that the insurance shall not be invalidated by any act or neglect of the mortgagor, or owner of the insured property, is an independent contract between the insurance company and the mortgagee, and no act or omission of the mortgagor will invalidate the policy, whether it occurs before, at the time of, or subsequent to, the issuance of the policy.

INSURANCE—INSURABLE INTEREST—MORTGAGEE.—A mortgagee of real estate has an insurable interest therein which he may insure on his own account, and when he effects such insurance he is insuring, not the real estate, but his interest or lien therein.

INSURANCE—MEANING OF "ENTIRE, UNCONDITIONAL, AND SOLE OWNERSHIP."—The terms "interest" and "title" are not synonymous terms in insurance policies. Hence a provision in a policy that it shall be void if the interest of the insured is not the entire, unconditional, and sole ownership of the property means, where the interest of a mortgagee is insured, not that he must be the owner of the legal title, but that the interest insured, namely, the mortgage lien, shall be, and is, an unconditional interest belonging to the mortgagee, and not a conditional or speculative one.

INSURANCE—FAILURE TO DISCLOSE EXISTENCE OF MORTGAGE—EFFECT OF.—If an application for fire insurance is oral and no inquiries are made by the agent of the insurer as to the condition of the title to the property, and the insured says nothing about the existence of a mortgage thereon, but does not keep silent from any sinister motive, or with the intention on his part to deceive or mislead the insurer, then the fact that when the policy was issued there existed a mortgage upon the insured property will not invalidate the policy, notwithstanding the fact that the policy provides that it should be void if there existed an encumbrance, by mortgage or otherwise, against the insured property.

INSURANCE—INSURABLE INTEREST—WHO HAS.—Even one who has no title, legal or equitable, in property, and no present possession or right of possession thereof, has an insurable interest therein, if he will derive benefit from its continuing to exist, or will suffer loss by its destruction.

INSURANCE—INSURABLE INTEREST OF MORTGAGOR AFTER SALE.—Although one mortgages his house and lot to secure the payment of a debt, for which he is personally answerable, and subsequently sells the property subject to the mortgage, he still has an insurable interest remaining in the property, for he will derive benefit from its continued existence, and will suffer loss by its destruction.

INSURANCE—INSURABLE INTEREST, INSURANCE OF—WAIVER OF FORFEITURE.—When an insurance company issues its policy and accepts and retains the premium without requiring an application by the insured, and without making inquiry as to the condition of the property or the state of its title, and the insured has, in fact, an insurable interest, the company will be conclusively presumed to have insured such interest and to have waived all provisions in the policy providing for its forfeiture by reason of any facts or circumstances affecting the condition or title of the property in regard to which no such statement was required or inquiry made.

INSURANCE—FORFEITURE IS WAIVED, WHEN AND HOW.—A forfeiture in a policy of insurance is waived where the insurer, being fully cognizant of the facts out of which a forfeiture is claimed, treats and continues to treat the contract as binding, and induces the insurer to act in that belief.

Thomas D. Crane, for the appellants.

B. G. Burbank, Charles Offutt and James B. Meikle, for the appellees.

744 RAGAN, C. September 1, 1888, William G. and Conrad Bohn were the owners in fee simple of a lot in the city of Omaha on which was situated a three-story building. On that date they were indebted to the National Life Insurance Company of Montpelier, Vermont, hereinafter called the "Life Insurance Company," in the sum of twenty-five thousand dollars, and to secure **745** said indebtedness they executed to said Life Insurance Company a mortgage upon said real estate. The mortgage required the said Bohns to keep said property insured during the existence of said mortgage against loss or damage by fire for the benefit of said Life Insurance Company or its assignee. On the said first day of September, 1888, the Hanover Fire Insurance Company and another, hereinafter called the "Fire Insurance Companies," issued and delivered their joint fire insurance policy to the Bohns, insuring said property in the sum of five thousand dollars against loss or damage by fire for one year, or until September 1, 1889. This policy had attached thereto a "mortgage clause" making the loss, if any, payable to the Life Insurance Company or its assignee. At the date of the issuance of this policy the legal title to said real estate was unencumbered except by the mortgage held by the Life Insurance Company. On the first day of September, 1889, the policy issued by the Fire Insurance Companies expired and was by them renewed for another year. The renewal expired on September 1, 1890, and was by the Fire Insurance Companies renewed for still another year, or until September 1, 1891. On the twelfth day of March, 1891, the property was wholly destroyed by fire. In the district court of Douglas county the Life Insurance Company and the Bohns sued the Fire Insurance Companies to recover the amount of loss and damage to said insured property. At the date of the trial of the action there remained due to the Life Insurance Company from the Bohns on the latter's mortgage debt about twenty thousand dollars. The Life Insurance Company and the Bohns had a verdict and judgment and the Fire Insurance Companies have brought the case here for review.

1. The alleged errors relied on for a reversal of this judgment may all be considered under the proposition whether under the proved and admitted facts the judgment is contrary to the law of the case. Prior to the date of the issuance of the policy in suit the Bohns sold and conveyed the real estate on which was situate the ⁷⁴⁶ insured building subject to the mortgage held by the Life Insurance Company. The policy provided: "If the interest of the assured in the property be untruly stated therein, or if the interest of the assured be other than the entire unconditional and sole ownership of the property, or if the property be encumbered by any other lien, mortgage, or otherwise, or if the subject of insurance be a building on ground not owned by the assured in fee simple, then and in every such case this policy shall be void." It is now insisted by the Fire Insurance Companies that since the Bohns were not the owners of the real estate on which the insured building was situate on the date of the issuance of the policy in suit, said policy has never had any force or validity whatever, and that, therefore, the judgment in favor of the Life Insurance Company cannot stand. At the time of the issuance of the policy in suit the Fire Insurance Companies attached to said insurance policy an agreement in writing called a "mortgage clause." It was provided in this "mortgage clause" that the loss, if any, should be payable to the Life Insurance Company; and it was further provided: "It is agreed that this insurance as to the interest of the above named mortgagee or beneficiary, or its assignee, only shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured." But what was the effect of this "mortgage clause" attached to this policy? We think that by this "mortgage clause" the Fire Insurance Companies entered into a contract with the Life Insurance Company in and by which they insured its interest as mortgagee in the insured property against loss or damage by fire to the extent of five thousand dollars for one year from September 1, 1890. The right of the Life Insurance Company to enforce the policy does not depend upon whether the Bohns have kept their engagements with the Fire Insurance Companies. By express provision of the "mortgage clause" attached to the policy no act or omission of the mortgagors or owners was to invalidate the insurance so far ⁷⁴⁷ as the Life Insurance Company or its assignee was concerned; and this was true whether said act or omission of the mortgagor or owner occurred at the date of the issuance of the policy prior

or subsequent thereto. In other words, it comes to this: that by the provision of the "mortgage clause" the Fire Insurance Companies insured the interest of the Life Insurance Company in the mortgaged property. The contract of insurance was made with the Life Insurance Company or with the Bohns for their benefit, and it is immaterial whether the Life Insurance Company itself paid the premium or whether the Bohns paid it, and it was clearly the intention of all the parties that the validity of the insurance of the Life Insurance Company should not depend upon anything which the Bohns or their grantees had done or omitted to do or might do or omit to do.

A question almost identical with the one under consideration was before this court in *Phenix Ins. Co. v. Omaha Loan etc. Co.*, 41 Neb. 834. The policy in that case provided that if the property should be sold or transferred without the written permission of the fire insurance company indorsed on the policy, then that the policy should become void. There was attached to the policy a "mortgage clause" like the one in the case at bar. Before the loss occurred the mortgagor sold and transferred the property, the consent of the fire insurance company thereto not having been obtained. The insured property was destroyed by fire, and the mortgagee sued the fire insurance company for the amount of the loss. It was insisted by the fire insurance company that as the mortgagor had sold and conveyed the insured property prior to the loss, that at the date of the loss the policy was not in force; but the court held that the sale and conveyance of the mortgaged property by the mortgagor without the consent of the insurance company did not avoid the policy as against the mortgagee. We have re-examined that case and the authorities therein cited, and are satisfied that the decision is correct, both upon principle ⁷⁴⁸ and authority, and we accordingly reaffirm it. Sustaining the doctrine announced in that case, see *Ellis v. Council Bluffs Ins. Co.*, 64 Iowa, 507; *Ellis v. Insurance Co. of North America*, 32 Fed. Rep. 646; *National Bank v. Union Ins. Co.*, 88 Cal. 497; 22 Am. St. Rep. 324.

The provision in the policy, that it should be void if the subject of the insurance was a building on ground not owned by the assured in fee simple, was not one that was binding or intended to be binding on the Life Insurance Company, mortgagee. The Fire Insurance Companies must have known when they issued the policy in suit with the mortgage clause attached thereto that the Life Insurance Company did not own the fee

simple title of the real estate on which the insured building was situate. The Life Insurance Company was not attempting to insure a fee simple interest in the mortgaged property, nor did the Fire Insurance Companies understand that the former was attempting to insure anything further than the interest it had in the property by virtue of its mortgage. All the authorities agree that a mortgagee of real estate has an insurable interest therein which he may insure on his own account, and when he effects such insurance he is insuring not the real estate, but insuring his interest or lien therein. The terms "interest" and "title" are not synonymous terms in insurance policies, and the provisions in the policy under consideration, that it should be void if the interest of the assured should be other than the entire unconditional and sole ownership of the property, meant and means, not that the Life Insurance Company should be the owner of the legal title to the real estate on which the insured building was situate, but that the interest which it insured, namely, its mortgage lien upon the property, should be and was an unconditional interest belonging to it, not a contingent or speculative one.

2. After September 1, 1888, and before the issuance of the policy in suit, without the knowledge or consent ⁷⁴⁹ of the Fire Insurance Companies, the Bohns placed two other mortgages upon the property mortgaged to the Life Insurance Company. It is now insisted by the Fire Insurance Companies that this action of the Bohns invalidated the policy in suit, since it was provided by the policy that it should become void if the insured property should be encumbered by any lien or mortgage. The jury made a special finding, and the evidence supports it, that in September, 1888, and in September, 1889 and 1890, when the policy of September, 1888, was renewed, no questions were asked by the Fire Insurance Companies or their agents as to encumbrances existing against the property of the Bohns, nor did the Bohns make any statement on the subject. The record shows also, without contradiction, that the application for the insurance in the first instance, September 1, 1888, and for the subsequent renewals of the policy were oral; no written application was made to the Fire Insurance Companies for the insurance; and there is in the record no claim of any fraud practiced or attempted to be practiced by any one. The neglect of the Bohns to notify the Fire Insurance Companies of the encumbrances on the property at the dates of the renewals thereof seems to have resulted

from the Fire Insurance Companies' not inquiring about encumbrances, and the Bohns not having them in mind. At all events it is not claimed that the Bohns, or either of them, were actuated by any sinister motives whatever in not disclosing to the Fire Insurance Companies the existence of these encumbrances in September, 1889 and 1890, when the policy was renewed. Where an application for fire insurance is oral and no inquiries are made by the agent of the insurer as to the condition of the title to the property, and the insured says nothing about the existence of a mortgage thereon, but does not keep silent from any sinister motive or with the intention on his part to deceive or mislead the insurer, then the fact that when the policy was issued there existed a mortgage upon the insured property will not invalidate the policy, notwithstanding ^{too} the fact that the policy provides that it should be void if there existed an encumbrance, by mortgage or otherwise, against the insured property: *Insurance Co. of North America v. Bachler*, 44 Neb. 549.

3. But it is insisted that the policy sued upon was never in force because the Bohns at the date of its issuance were not the unconditional and sole owners of the insured property and that the insured building was not situated on ground to which the Bohns had a fee simple title. This contention involves the assumption that the Bohns at the date of the issuance of the policy in suit had no insurable interest in the insured property. Is this contention correct? What is an insurable interest? In *German Ins. Co. v. Hyman*, 34 Neb. 704, Post, J., speaking to this question, said: "An interest, to be insurable, does not depend necessarily upon the ownership of the property. It may be a special or limited interest disconnected from any title, lien, or possession. If the holder of an interest in property will suffer loss by its destruction he may indemnify himself therefrom by a contract of insurance. If, by the loss, the holder of the interest is deprived of the possession, enjoyment, or profit of the property, or a security or lien arising thereon, or other certain benefits growing out of or depending upon it, he has an insurable interest": To the same effect see *Merrett v. Farmers Ins. Co.*, 42 Iowa, 11; *Rochester Loan etc. Co. v. Liberty Ins. Co.* 44 Neb. 537; 48 Am. St. Rep. 745. In *Warren v. Davenport Fire Ins. Co.*, 31 Iowa, 464, 7 Am. Rep. 160, it was held: "The owner of stock in a corporation organized for pecuniary profit has, by reason of such ownership, an insurable interest in the corporate property."

In *Williams v. Roger Williams Ins. Co.*, 107 Mass. 377, 9 Am. Rep. 4, it was held that a mortgagee who had indorsed the note secured by his mortgage and become liable as an indorser on said note had an insurable interest in the mortgaged property. The court said: "It is now well established that even one who has no title, legal or equitable, in the property, and no present possession or right of possession thereof, yet has ⁷⁵¹ an insurable interest therein, if he will derive benefit from its continuing to exist, or will suffer loss by its destruction." In *Waring v. Loder*, 53 N. Y. 581, it was held that where one had mortgaged his real estate to secure his debt and afterward conveyed the real estate he still had an insurable interest in the property. To the same effect see *Lycoming Fire Ins. Co. v. Jackson*, 83 Ill. 302; 25 Am. Rep. 386; *Norwich Fire Ins. Co. v. Boomer*, 52 Ill. 442; 4 Am. Rep. 618. In the case at bar, if we regard the contract of insurance made between the Bohns and the Fire Insurance Companies as having been made at the date of the issuance of the policy sued upon, we still think that they had an insurable interest in the insured property. They had sold the property subject to the mortgage thereon in favor of the Life Insurance Company, and they were personally and individually responsible for that mortgage debt. They would derive a benefit from the continued existence of the property and they would suffer loss by its destruction.

Was the policy in suit never in force because at the date of its issuance the Bohns were not the owners of the legal title to the real estate upon which were situated the insured buildings? It has already been stated that the Bohns owned the fee simple title to this real estate when the policy was first issued, September, 1888, that the application for the insurance and the renewals of the insurance were oral; that no questions as to the title of the Bohns were ever propounded to them by the Fire Insurance Companies or their agents; that neither of the Bohns ever made any representations to the Fire Insurance Companies as to what title they had or held; that the Bohns were not actuated by any sinister motives whatever in not disclosing the nature of the interest they had in the insured property; that no fraud was attempted by any one, and that the failure of the Bohns in September, 1890, to disclose the exact nature of their interest in the insured property resulted either from their not thinking about it, or from the failure of the Fire Insurance ⁷⁵² Companies to inquire about that interest. Under these facts we think the policy, notwithstanding its provisions, was in force

even in favor of the Bohns at the time the loss sued for occurred. In *Hall v. Niagara Fire Ins. Co.*, 93 Mich. 184, 32 Am. St. Rep. 497, a fire insurance policy contained a provision that it was void if the assured was not the sole and unconditional owner of the property, or if the insured building stood on ground not owned in fee simple by the assured. The application for insurance in that case was oral, and no statement was made by the assured as to the condition or nature of his title. The supreme court of Michigan held, in construing the policy, that the provision quoted above applied only to such changes of title as arose after the execution of the policy, and not to the condition of the title of the property at the time the policy was issued. In *Norwich Fire Ins. Co. v. Boomer*, 52 Ill 442, 4 Am. Rep. 618, it was held that upon an application for insurance the party applying is bound to disclose the facts material to the risk, but in the absence of a requirement on the subject in the policy, or of any inquiry in respect thereto, it is not essential that he should disclose the nature of his interest in the property sought to be insured. It is sufficient if he have an insurable interest. And in *Lycoming Fire Ins. Co. v. Jackson*, 83 Ill. 302, 25 Am. Rep. 386, it was held: "The principal thing in an insurance is, that the assured has an insurable interest, and has acted in good faith. Under a statement that he is the owner, he is only bound to prove an insurable interest, which is such a title as, if there would be a loss without insurance, it would fall upon him. A mortgagor has such an interest." In *Philadelphia Tool Co. v. British-American Assur. Co.*, 132 Pa. St. 236, 19 Am. St. Rep. 596, the policy provided: "If the assured is not the sole and unconditional owner of the property, or if the building stood on ground not owned in fee simple by the assured, . . . then the policy shall be void." The assured had only a lease from year to year on the land upon which the insured building stood. The supreme court of Pennsylvania, in construing ⁷⁵³ the policy, said: "A policy of insurance, like any other contract, is to be read in the light of the circumstances that surround it. This policy was issued without any application or written request describing the interest of the assured in the building. No actual representation of any sort upon the subject, oral or written, is alleged to have been made by or on behalf of the assured. We ought to assume that a policy written under such circumstances was written upon the knowledge of the representative of the insurer and intended to cover in good faith the interest which the insured had

in the buildings. Fraud is never to be presumed, and in this case no fraudulent representation is shown or alleged. . . . We conclude that the policy . . . was intended to cover such interest in the buildings as the insurer had. This was a leasehold only, but it was an insurable interest. Presumably it is the interest which an application, if one had been made, would have shown, for it is the only interest which the tool company ever had or claimed to have. To such an interest the proviso whose protection is invoked is not applicable. The policy covering only the interest of the lessee, the ownership of the fee becomes immaterial." Finally, in *German Ins. etc. Inst. v. Kline*, 44 Neb. 395, it was held by this court: "When an insurance company issues its policy and accepts and retains the premium without requiring an application by the insured, and without making inquiry as to the condition of the property or the state of its title, and the insured has in fact an insurable interest, the company will be conclusively presumed to have insured such interest and to have waived all provisions in the policy providing for its forfeiture by reason of any facts or circumstances affecting the condition or title of the property in regard to which no such statement was required or inquiry made." This case is decisive against the plaintiff in error of the contention under consideration.

4. As already stated, the loss sued for in this action ⁷⁵⁴ occurred on the 12th of March, 1891. Within a day or two thereafter the Fire Insurance Companies discovered that the Bohns were not the owners in fee simple of the real estate on which the insured building stood in September, 1890, nor had they been since that time. The Fire Insurance Companies, however, did not then cancel, or attempt to cancel, the policy in suit or declare it forfeited; on the contrary they demanded and were furnished proofs of loss; demanded that the insured should submit to arbitration and an appraisement of the damages sustained; and not until the case came on for trial in November, 1892, did the Fire Insurance Companies make any attempt to declare a forfeiture of the policy in suit. The jury made a special finding, and the evidence supports it, that the Fire Insurance Companies, with full knowledge of the fact as to the true condition of the title of the insured property, retained the premiums received by them from the Bohns and neglected for an unreasonable length of time to insist on the forfeiture of the policy, and by other acts had recognized and treated the policy as a valid, subsisting contract between them and the Bohns and had induced the Bohns

to act in that belief. We think that the Fire Insurance Companies by their conduct in the premises waived their right to insist upon a forfeiture of the insurance policy in suit. A forfeiture in the policy of insurance may be waived where the insurer is fully cognizant of the facts out of which a forfeiture is claimed and treats and continues to treat the contract as binding and induces the insurer to act in that belief: *Billings v. German Ins. Co.*, 34 Neb. 502, and cases there cited.

Counsel for plaintiff in error indulges in certain criticisms upon some of the instructions of the trial court, but these call for no special notice. The judgment of the district court is right and is in all things affirmed.

INSURANCE.—The effect of a "mortgage clause" as an independent contract is discussed in the monographic note to *Oakland Home Ins. Co. v. Bank of Commerce*, 47 Neb. 717, ante, p. 663, on when conditions of forfeiture in a policy of insurance apply against a mortgagee to whom the loss has been made payable. It is not necessary that the insured have an interest, either legal or equitable, in the property insured. It is enough that he is so situated in regard to it that he would be liable to loss should it be injured by the peril insured against: *Note to Rochester etc. Co. v. Liberty Ins. Co.*, 48 Am. St. Rep. 753. A mortgagee has an insurable interest in mortgaged property: *King v. State etc. Ins. Co.*, 7 Oush. 1, 54 Am. Dec. 683, and monographic note thereto on the insurable interest and rights of mortgagee under insurance of mortgaged property. The condition in a policy of insurance that it shall be void in case the interest of the insured be other than "unconditional and sole ownership" refers only to the quality of the estate or interest, and is not avoided by any sort of an encumbrance: *Note to Loventhal v. Home Ins. Co.*, 57 Am. St. Rep. 28. Such a condition is not to be understood in its technical sense, but as requiring that the insured shall be the actual and substantial owner: *Yost v. McKee*, 179 Pa. St. 381; 57 Am. St. Rep. 604. If an insurer issues a policy without an application or any representation in regard to the title to the property upon which the insurance is effected, he cannot complain, after a loss, that the interest of the assured was not disclosed: *Morotock Ins. Co. v. Roderfer*, 92 Va. 747; 53 Am. St. Rep. 846, and note. A forfeiture will be deemed waived by any agreement, declaration, or course of action, on the part of him who is benefited by such forfeiture, which leads the other party to believe that, by conforming thereto, the forfeiture will not be incurred: *Hudson v. Northern Pac. Ry. Co.*, 92 Iowa, 231; 54 Am. St. Rep. 550, and note.

CASES
IN THE
SUPREME COURT
OF
NEVADA.

HULLEY v. CHEDIC.

[22 NEVADA, 127.]

ATTACHMENT—GARNISHMENT AS A LIEN.—A notice of garnishment served upon a debtor gives the creditor a right of action against the garnishee for money or property in his hands, owing or belonging to the party against whom the writ runs; but it does not create a lien on all the garnishee's property which may subsequently be delivered in payment of the debt.

ATTACHMENT—GARNISHMENT AS A LIEN.—A notice of garnishment served upon a debtor does not give the creditor any lien upon money with which the garnishee may subsequently pay his debts, or enable the garnisher to follow the money into the hands of third persons, to whom it has been paid, especially where it does not come from the garnishee, but is obtained by him through the assignment of a judgment founded upon the debt against which the garnishment has been levied.

FRAUDULENT CONVEYANCES—DEFAUDING CREDITORS—RIGHT OF ACTION AGAINST FRAUDULENT TRANSFEREE.—A judgment creditor, whose execution has been returned unsatisfied, has an equitable right of action to recover a money judgment against one to whom the debtor has transferred property for the purpose of hindering, delaying, or defrauding his creditors, and who has subsequently converted it into money. The fact that such an action is brought in pursuance of an order obtained in a proceeding supplemental to execution does not make it an action at law.

EQUITY—JURY TRIAL—SUBMISSION OF ISSUES IN EQUITY CASES.—Special issues only should be submitted to a jury which has been called to assist in the trial of an equity case. Therefore, a judgment based upon a general verdict in such an action is erroneous.

GIFT OF NOTE CAUSA MORTIS, VALIDITY OF.—If a note is regularly indorsed and delivered by the payee as a gift causa mortis, the gift is not void, though the donor recovers from his illness, but simply voidable by the donor only, or his lawful representative. The indorsee, therefore, has the right to enforce payment, which cannot be resisted, either by the maker or his creditors, upon the

ground that the indorsement was made *causa mortis*, and that the gift had been subsequently revoked by the recovery of the donor.

FRAUDULENT CONVEYANCES TO DEFEAT CREDITORS.
An assignment made and accepted for the purpose of hindering, delaying, or defrauding creditors is, as to those creditors, void.

Action for a money judgment against a person to whom a debtor had transferred property for the purpose, it was alleged, of hindering, delaying, and defrauding creditors. It appeared that on June 4, 1891, A. E. Harris executed and delivered to the defendant, W. H. Chedic, a promissory note for about four thousand dollars, which was secured by a chattel mortgage upon certain property situated in Ormsby county, Nevada. It was claimed that this note and mortgage were immediately assigned by the mortgagee to his mother, Adeline A. Chedic, as security for three thousand nine hundred dollars, which he then owed her upon a note made by him to his father some time prior to that, and by his father given to her. Another chattel mortgage upon the same property had also been executed by Harris to one D. C. Simpson, upon which an action of foreclosure was commenced by Simpson. The Chedic note and mortgage were, on February 10, 1892, assigned back by Adeline to W. H. Chedic, who, on February 11, 1892, intervened in the action commenced by Simpson, alleging that he was the owner of the Chedic note and mortgage, and asking for a judgment thereon against Harris, and for a foreclosure of the mortgage, as a first lien upon the property. A decree, as prayed for, was rendered in favor of W. H. Chedic, on May 19, 1892. The plaintiff, Hulley, had, on April 19, 1892, obtained a judgment against W. H. Chedic for the sum of sixteen hundred and five dollars, with interest and costs, upon a note made by the latter to him on October 1, 1890. Hulley caused a notice of garnishment to be served upon Harris on April 20, 1892, intending to garnish the money then owing by him to W. H. Chedic, upon the note and mortgage then in suit. The judgment obtained by W. H. Chedic against Harris was assigned by the former, on August 4, 1892, to Adeline. The plaintiff alleged that this assignment was made and accepted for the purpose of hindering, delaying, and defrauding the creditors of W. H. Chedic. On February 6, 1893, W. H. Chedic and Adeline assigned the said judgment to Simpson for the sum of four thousand one hundred and ninety-five dollars, which was paid to Adeline. A second execution was issued, on February 16, 1893, upon Hulley's judgment against W. H. Chedic, and a notice of garnishment was served the same day upon Adeline, to which she made no

answer. She was then cited in supplementary proceedings to appear before a referee, where she denied any indebtedness to W. H. Chedic, and claimed to own the money obtained by her from Simpson. An order was thereupon made authorizing Hulley to institute an action against her to recover so much of the money as might be necessary to pay his judgment against W. H. Chedic, and this action was then commenced by Hulley against W. H. Chedic and Adeline. The execution upon the plaintiff's judgment was returned unsatisfied. The complaint, in the action authorized, asked for judgment against Adeline for the sum of two thousand one hundred and sixty-four dollars and eighty cents, with interest, that being the amount due upon Hulley's judgment against W. H. Chedic. There was a judgment for the defendants, and the plaintiff appealed.

Trenmor Coffin and James D. Torreyson, for the appellant.

Robert M. Clarke, for the respondent.

¹³⁹ BIGELOW, J. To the proper disposition of this case, it seems necessary to first determine what are the plaintiff's rights under the allegations of his complaint, and what were the issues to be determined upon the trial. Admitting, as contended by the plaintiff's attorneys, that by the assignment made February 10, 1892, from Adeline A. Chedic to W. H. Chedic, the latter ¹⁴⁰ became vested with such a title to the note and mortgage as made the debt owing by Harris subject to the claims of W. H. Chedic's creditors, we are of the opinion that the plaintiff, by his garnishment of Harris, obtained no claim upon the money received by her in consideration of the assignment of the judgment to Simpson.

This conclusion is based upon two grounds: 1. However it may be with specific property in the hands of a garnishee, our conclusion is that garnishment does not give the creditor any lien upon a debt owing by the garnishee to the debtor in the action, nor upon any money or property with which he may afterward pay it. The books speak of it as giving a "quasi lien"—such a lien as will justify the garnishee in refusing to pay his creditor until the garnishment is disposed of, and as will give the creditor a right of action against the garnishee for any money or property in his hands owing or belonging to the party against whom the writ runs (Wade on Attachments, sec. 329), but not such a lien as will enable the creditor to follow any money that may be paid thereon into the hands of third persons. The only case

cited as sustaining a contrary view is that of *Sessions v. Stevens*, 1 Fla. 233, 46 Am. Dec. 339, where the point involved was the right of an assignee of a note to maintain an action against the maker where, previous to the assignment, the maker had been garnished in an action against the payee, and judgment obtained against him in the garnishment proceedings. That, of course, is quite a different question from the one we have here, and, as applied to this case, some of the language used is a little too strong. The authorities are in conflict as to whether a garnishment creates such a lien upon specific property in the hands of the garnishee as will enable the garnisher to follow it into the hands of third persons. Among those in the affirmative we may cite *Focke v. Blum*, 82 Tex. 436, and *Reed v. Fletcher*, 24 Neb. 435; while, in the negative, we find *Bigelow v. Andress*, 31 Ill. 333; *McGarry v. Lewis Coal Co.*, 93 Mo. 237; 3 Am. St. Rep. 522; *Mooar v. Walker*, 46 Iowa, 164; *McConnell v. Denham*, 73 Iowa, 494; *Johnson v. Gorham*, 6 Cal. 195; 65 Am. Dec. 501; *Wade on Attachments*, secs. 325, 334, 338; *Drake on Attachments*, sec. 453; *Brown on Jurisprudence*, sec. 149. But, as already remarked, this is not the question here, but—viewing the case most favorably to the plaintiff—whether, by ¹⁴¹ garnishment of a debtor, a right can be obtained which will enable the creditor to follow money paid upon the debt into the hands of third persons; and we do not hesitate to say that it cannot. Such a debt can be paid by any legal tender money. No particular pieces belong to the creditor; and it would be, under such circumstances, an anomalous thing to hold that a lien can be obtained upon that which may be paid to him or his assignee. To so hold would be equivalent to determining that a garnishment creates a lien on all the garnishee's property which might subsequently be delivered in settlement of the debt; but, clearly, that is not the law: *Drake on Attachments*, sec. 226, and cases cited. 2. The money in the hands of *Adeline A. Chedic* is money received by her, not, so far as is shown by the complaint, from *Harris*, the garnishee, but from *Simpson*, upon the assignment of the judgment to him. Admitting that the garnishment of *Harris* would bind the money that he might subsequently pay upon his indebtedness to *W. H. Chedic* or his assignee, so that, by reason of its receipt, the plaintiff would have a cause of action against the assignee, that is not the situation here. Certainly, the garnishment could not have the effect to prevent *Chedic* from assigning his judgment. The garnishment was only for about two thousand dollars, while the judgment was

for four thousand dollars. Subject only to the garnishment, the judgment was his, to dispose of as he saw fit. Possibly, the purchaser would take it subject to the garnishment, but it would not prevent Chedic from assigning it all. Nor would these facts make his assignee, who might again assign it, responsible to the garnisher for money received upon the assignment. Proof of these matters might be admissible upon the question of fraud, still to be considered; but they do not, of themselves, constitute a cause of action against Mrs. Chedic.

2. It is, however, alleged in the complaint that the execution upon the plaintiff's judgment has been returned unsatisfied, and that the assignment of the judgment by W. H. Chedic to his mother was without consideration, and was made and accepted for the purpose of hindering, delaying, and defrauding his creditors. We are of the opinion that, if these allegations are supported by the proofs, they are sufficient to entitle the plaintiff to a judgment against Adeline for the amount of his judgment against W. H. Chedic. The ¹⁴² complaint shows that W. H. Chedic obtained the judgment against Harris. Presumptively it belonged to him. As such, it constituted property that was subject to the claims of his creditors, and if assigned by him, and received by the assignee, for the purpose of defrauding his creditors, the assignee held it in trust for the creditors; and if she subsequently assigned it to another, as it is alleged she did, then the money received by her upon the assignment is held subject to the same trust: *Ferguson v. Hillman*, 55 Wis. 181; *La Crosse Nat. Bank v. Wilson*, 74 Wis. 391; *Murtha v. Curley*, 90 N. Y. 372; *Fullerton v. Viall*, 42 How. Pr. 294; 2 *Bigelow on Fraud*, 420; *Bump on Fraudulent Conveyances*, 567; *Wait on Fraudulent Conveyances*, sec. 177. The charge of fraud is denied in the answer, and it is this allegation and denial that constitute the issue to be tried in the action.

3. A jury trial was demanded by the defendants, but objected to by the plaintiff, who contended that the case was one in equity, and should be tried by the court, or, if a jury were called, that only special issues should be submitted to it. The court ruled that the action was at law, and should be submitted to the jury for a general verdict; and at the close of the testimony it was, against the plaintiff's objections, accordingly so submitted. A general verdict was found, upon which judgment was rendered for defendants. In this ruling, we are of the opinion that the learned judge fell into error. The principle concerning the right of a party to a jury trial is thus stated in *Fish v. Benson*, 71 Cal.

428, 435: "Both courts of law and in equity, in proper cases, have jurisdiction in cases of fraud; and when the facts constituting the fraud, and the relief sought, are such as are cognizable in a court of law, the parties are entitled to a jury trial. But where the case, as made by the pleadings, involves the application of the doctrines of equity, and the granting of relief which can be obtained in a court of equity, and not elsewhere, the parties are not entitled to a jury trial."

Under our system, where law and equity are administered by the same court, and in actions which, in form, in no wise differ from one another, it is sometimes somewhat difficult to determine whether the action is at law or in equity, or, perhaps, more accurately, whether it calls for legal or equitable relief. The rule for determining this is well and accurately ¹⁴³ stated in *Cole v. Reynolds*, 18 N. Y. 74, 76, as follows: "The principles by which the rights of the parties are to be determined remain unchanged. The code has given no new causes of action. In some cases parties are allowed to maintain an action who could not have maintained it before, but in no case can such an action be maintained when no action at all could have been maintained before upon the same state of facts. If, under the former system, a given state of facts would have entitled a party to a decree in equity in his favor the same state of facts in an action prosecuted in a manner prescribed by the code will now entitle him to a judgment to the same effect. If the facts are such that at the common law the party would have been entitled to a judgment, he will, by proceeding as the code requires, obtain the same judgment. The question, therefore, is whether, in the case now under consideration, the facts, as they are assumed to be, would, before the adoption of the code, have sustained an action at law or a suit in equity."

The action against Adeline Chedic is based upon a state of facts in which, prior to the code, relief could only have been obtained in a creditor's suit in equity. The property sought to be made subject to the plaintiff's demand could not be reached or levied upon by an officer. "In cases where the legal title to the property is such that it cannot be seized under execution, resort to equity is necessary": *Mulford v. Peterson*, 35 N. J. L. 127, 133. The plaintiff has no title to the money in Mrs. Chedic's hands, nor had he any to the judgment through which she obtained it. He has simply an equitable right to demand that she shall account for his debtor's property, which

has been fraudulently conveyed to her, and subsequently converted into money. As a legal demand, the complaint states no cause of action whatever (*Murtha v. Curley*, 47 N. Y. Sup. Ct. 393; *Wellington v. Small*, 3 Cush. 145; 50 Am. Dec. 719; *Lamb v. Stone*, 11 Pick. 527; *Moody v. Burton*, 27 Me. 427; 46 Am. Dec. 612; Wait on *Fraudulent Conveyances*, sec. 62), but is sufficient in equity. In *Ferguson v. Hillman*, 55 Wis. 181, 191—a cause quite like the present—the court, speaking by Mr. Justice Taylor, said: “The original conveyance being void as to creditors, no title, as to them, ever passed to the grantee; and if he sells it, and receives the money, he must hold the money for the benefit of the creditors. In equity, such money ¹⁴⁴ in the hands of the fraudulent grantee is held for the benefit of the creditors; and although they may not be able to maintain an action at law for money had and received for their use, because they were never the owners of, or had the title to, the property which had been converted into such money, yet a court of equity, having all the parties interested before it, may make such order as to the application thereof as may be just.”

Murtha v. Curley, 47 N. Y. Sup. Ct. 393, 90 N. Y. 372, was an action brought to recover a money judgment against the defendant, upon the ground that he had, for the purpose of hindering, delaying, and defrauding the creditors of one Doyle, of which the plaintiff was one, taken a mortgage from Doyle upon certain personal property, which he had subsequently foreclosed, and converted the proceeds to his own use. The plaintiff obtained judgment, but upon appeal to the general term the judgment was reversed; that court being of the opinion that the action was one at law, and, as such, not maintainable. The plaintiff then carried the case to the court of appeals, where the latter judgment was, in turn, reversed; the court of appeals, while admitting the correctness of the decision of the general term, if the action were one at law, coming to the conclusion that it was in equity, and consequently properly brought. In delivering the opinion, Mr. Justice Earl said: “It appears from the opinion pronounced at the general term that the action was there treated, not as a creditor’s bill, but as an action at law to recover damages for the fraud alleged, and the conclusion reached was that such an action could not be maintained; and the decision of the general term was sought by Curley’s counsel to be sustained, in his argument before us, upon the same

ground. We are of the opinion that the learned general term fell into error. The complaint contains all the allegations requisite for what is commonly called a 'creditor's bill,' to wit, that the plaintiff was a creditor of Doyle, having a judgment and execution returned unsatisfied, that the mortgages were executed by Doyle with the intent to hinder, delay, and defraud his creditors; and that Curley had converted the mortgaged property by a sale, and had taken the proceeds to his own use." It is argued, however, that the right to maintain this action came through the order ¹⁴⁵ authorizing it, made in the supplemental proceeding against Adeline Chedic; that, as that was a statutory proceeding—a proceeding at law—the action authorized by it must also be an action at law. This does not follow. In authorizing an action, the statute, of course, means the kind of action calculated to give the proper remedy. It may be that in some cases an action at law would furnish full relief, while in others it would not. In fact, in a case founded, as this is, upon a fraudulent transfer of property, it does not seem to be necessary to resort to supplemental proceedings at all; and consequently, without such order, the action could be maintained. The rule is correctly stated in 2 Freeman on Executions, section 394, as follows: "But two of the chief objects of creditors' bills were to reach equitable assets, and to set aside fraudulent transfers of property. For the pursuit of these objects, supplemental proceedings do not afford an adequate remedy; and hence both, as formerly, may still be pursued by creditors' suits." Besides the numerous cases cited by Mr. Freeman, see, to the same effect, *Herrlich v. Kaufmann*, 99 Cal. 271; 37 Am. St. Rep. 50; *La Crosse Nat. Bank v. Wilson*, 74 Wis. 391, 399; *Bufford v. Holley*, 28 Fed. Rep. 680.

4. Being an equity case, only special issues should have been submitted to the jury; and it was clearly error to direct them, against the plaintiff's objections, to find a general verdict, and then to render judgment thereon as in an action at law: *Dunphy v. Kleinschmith*, 11 Wall. 610, 615; *Simpson v. Harris*, 21 Nev. 353, 376, and cases cited.

5. From the defendants' testimony, it appears that the note which they claim was owing by W. H. Chedic to Adeline Chedic, and to secure which he assigned the judgment in the foreclosure suit, was indorsed and delivered by the payee, his father, to Adeline, a month or two before his death. The plaintiff contends that the evidence also shows the transaction to have been

a gift in expectation of death; that he recovered from the illness from which he was then suffering; that this recovery had the effect to revoke the gift; and, consequently, that she had no title to the note; and, aside from that, he owed her nothing—the transfer of the judgment to her was without consideration. Upon this theory the plaintiff requested the court to submit several special issues, and afterward to make findings concerning the matter, which ¹⁴⁶ were all refused. We are of the opinion that these rulings were correct. The note had been, according to the testimony, actually indorsed and delivered to Adeline Chedic. Thereby, the legal title had been transferred to her; and this gave her the right to enforce payment, without regard to the relations existing between herself and the indorser. As to the maker of the note, except, possibly, in so far as he may have had an offset against the payee, the note was hers. The gift was not void, but voidable; and that only by the donor, or his lawful representative: *Prouty v. Roberts*, 6 Cush. 19; 53 Am. Dec. 761; *Carrier v. Sears*, 4 Allen, 336; 81 Am. Dec. 707; *Brown v. Penfield*, 36 N. Y. 473; *Poorman v. Mills*, 35 Cal. 118; 95 Am. Dec. 90.

But, of course, without regard to this question, and without regard to whether anything was or was not owing from W. H. Chedic to his mother, if the assignment was made and accepted for the purpose of hindering, delaying, or defrauding his creditors, as to those creditors it was void: *Simpson v. Harris*, 21 Nev. 353, 375. If there was no consideration, the fraud would simply be a little easier to prove: *Wait on Fraudulent Conveyances*, sec. 208.

Judgment reversed, and cause remanded for a new trial.

GARNISHMENT AS A LIEN.—Service of the process of garnishment does not create a specific lien in favor of the plaintiff upon the property of the defendant in the hands of the garnishee: *McGarry v. Lewis Coal Co.*, 93 Mo. 237; 3 Am. St. Rep. 522. *Contra*, *Northfield Knife Co. v. Shapleigh*, 24 Neb. 635; 8 Am. St. Rep. 224.

FRAUDULENT CONVEYANCES—FOLLOWING PROPERTY.—A voluntary conveyance, made with intent to hinder, delay, and defraud creditors, is void as against subsequent, as well as prior, creditors, though the grantee did not know of, nor participate in, the fraudulent intent of the grantor: *Gilliland v. Jones*, 144 Ind. 662; 55 Am. St. Rep. 210; and judgment creditors, without a lien, may file a bill in chancery to subject to the payment of their debts any property fraudulently transferred or conveyed by their debtor: *Wooten v. Steele*, 109 Ala. 563; 55 Am. St. Rep. 947.

GIFT OF NOTE CAUSA MORTIS, VALIDITY OF.—The delivery of a promissory note given causa mortis will pass the beneficial interest to the donee: *Ashbrook v. Ryon*, 2 Bush, 228; 92 Am. Dec. 481.

COFFIN v. BELL.

[22 NEVADA, 169.]

PROCESS.—IF CONSTRUCTIVE SERVICE OF SUMMONS is relied upon to sustain a judgment, there must have been a strict compliance with the provisions of the statute, this being necessary to obtain jurisdiction over the defendant.

PROCESS—SECOND SERVICE OF SUMMONS.—If the first service of a summons is a nullity, the fact that the summons has been returned and filed does preclude another and perfect service of it, as the summons may be withdrawn and properly served.

PROCESS.—AN ORDER FOR THE PUBLICATION OF A SUMMONS must follow the issuance of the summons and not precede it.

JUDGMENT BY DEFAULT, WHEN VOID—SERVICE BY PUBLICATION.—If the first service of a summons is a nullity because no affidavit or order for the publication of summons was made, a judgment by default, upon service by publication, where the summons served was not the one ordered to be published, but one that was issued two days after the order was made, is void for want of jurisdiction.

JUDGMENT VOID FOR WANT OF JURISDICTION—ATTACK BY PURCHASER IS DIRECT AND NOT COLLATERAL.—One who purchases, of the owner, property which has been sold upon an execution issued under a void judgment, has a right, in an action to quiet title, to attack the judgment on the ground of lack of jurisdiction in the court rendering it, and such attack is a direct and not a collateral one.

Action to quiet title. The defendant, Bell, commenced an action on December 14, 1892, against Mrs. C. R. Goddard, to recover a money judgment upon an account. He at the same time had an attachment issued and levied upon the property in dispute in this action, which was a parcel of real estate in Carson City. In the action brought by Bell against Mrs. Goddard, summons was issued, and served on the defendant in the state of California, but no affidavit or order for the publication of summons was made. Judgment by default was entered upon this service on January 28, 1893, execution was issued, and the property sold thereunder to the defendant Bell, by the defendant Kinney, as sheriff. Without vacating that judgment or withdrawing the summons from the files, Bell made an affidavit, on July 19, 1893, for publication of the summons. In this affidavit he stated that the summons had been issued on December 14, 1892. An order was made on July 19, 1893, stating that, "it further appearing that a summons has been duly issued out of said court in this action, it is ordered that the service of the summons in this action be made upon the defendant, by publication," etc. A so-called "alias summons" was issued on July 21, 1893. This was

a copy of the first except that the first said nothing about costs, while the alias summons stated that the action was also brought to recover costs of suit, and notified the defendant that, if she failed to answer the complaint, the plaintiff would also take judgment against her for his costs of suit. Service of the alias summons was made upon the defendant in the state of California, and judgment was again entered against her by default on October 21, 1893. The property was again sold to Bell upon execution under the second judgment. The plaintiff in this action, Coffin, had, on February 14, 1893, purchased the property from Mrs. Goddard, and on June 30, 1893, had begun this action against Bell and Kinney, the sheriff, to quiet his title thereto as against the first judgment and sale, and to restrain the sheriff from executing any deed to Bell. The defendants, by their answer admitted the invalidity of the first judgment, but alleged their attachment lien, and that they were then engaged in obtaining a second service of summons upon Mrs. Goddard. The defendants also set up, by supplemental answer, filed February 1, 1894, the second judgment and sale thereunder. The defendants had a judgment for costs, and the plaintiff appealed.

Trenmor Coffin and H. F. Bartine, for the appellant.

Torreyson & Summerfield, for the respondents.

¹⁸³ BIGELOW, J. Where constructive service of summons is relied upon to sustain a judgment, a strict compliance with the provisions of the statute is required: *Little v. Currie*, 5 Nev. 90; *Scorpion etc. Min. Co. v. Marsano*, 10 Nev. 370; *Victor etc. Co. v. Justice Court*, 18 Nev. 21; *Galpin v. Page*, 18 Wall. 350; *Guaranty Trust etc. Co. v. Green Cove Springs etc. Co.*, 139 U. S. 137; otherwise the court obtains no jurisdiction over the defendant; and the want of such jurisdiction, when permitted to be shown under the rules of law concerning direct and collateral attack, is fatal to the judgment.

The question here is upon the sufficiency of the second judgment entered in the action of Bell v. Goddard. It is claimed to be fatally defective, as against the present plaintiff, upon a number of grounds, but it will only be necessary to notice one or two of them.

The affidavit and order for the publication of the summons clearly referred to the original summons which had been issued long prior thereto, and which the other directed to be published. Where publication is ordered, personal service of the

summons out of the state is, by section 31 of the practice act, made equivalent to publication and deposit in the postoffice; and, in accordance with this, service was made upon the defendant herein in the state of California, but not of the summons ordered to be published. When it was found that the first judgment was insufficient, proper practice would doubtless have been to vacate that judgment, withdraw the summons from the file, and serve it again. The ¹⁸⁴ first service was a nullity, and, of course, would not prevent a good service from being subsequently made; nor did the fact that the summons had been returned and filed with the clerk prevent this course being taken: *Hancock v. Preuss*, 40 Cal. 572. This would have been correct, but in saying this we do not mean to decide that some other course might not also be held sufficient. But instead of this, two days after the order was made, a second summons, differing in some respects from the original, was issued and served upon Mrs. Goddard. We have no statute authorizing an alias summons, and in the only case found bearing upon the right to issue one without such authorization (*Dupuy v. Shear*, 29 Cal. 238, 240) it is said, though not decided, that an alias summons is not known to our system of practice. It is, however, unnecessary to decide the point here. It was held in the case last cited—a conclusion with which we agree—that, if more than one summons is authorized by the practice act, the second has no necessary connection with or dependence upon the first. It is based upon the complaint alone. We are of the opinion that, if it has any validity whatever, it stands the same as though it were the original summons in the case; and that brings us to the point that the summons which was served upon Mrs. Goddard, and which is relied upon to sustain the judgment, was not issued until two days after the order for publication was made.

In *People v. Huber*, 20 Cal. 81, it was held that a judgment founded upon the publication of a summons issued four days after the order for its publication was made was void. In answer to the contention that the order could be made in advance, to take effect when the summons was issued, the court said: "The practice act contemplates that the judge must be satisfied by affidavit of the absence of the defendant at the time when he is applied to for his order, and when it is to take effect. If an order might be procured in advance, and held four days before taking out of the summons, it might be held for a much longer time, and so that when the summons actually issues, the defendant may have returned to the state."

In *Little v. Currie*, 5 Nev. 90, the case of *People v. Huber*, 20 Cal. 81, was cited and followed, this court there saying: "It [the order for publication] also directs a summons to issue. This ¹⁸⁵ is not its office. The order should be that 'service be made by the publication of the summons.' Suit is commenced before the justice by the 'filing a copy of the note,' etc., 'and the issuance of a summons thereon.' The order is a direction of extraordinary manner of service, and presupposes the existence of a summons; otherwise it is premature. . . . Statutory directions for acquiring jurisdiction by any other than personal service must be strictly pursued."

In their brief, respondents' counsel contend that these are matters that only concern Mrs. Goddard, and that she is the only one that can complain of the insufficiency of the service, or of the issuance of the alias summons; but in this, we think, they are mistaken. As a purchaser from her, the plaintiff seems to occupy, as to this property, the same position that she herself would have occupied, and to have succeeded to all her rights: *People v. Mullan*, 65 Cal. 396. As her successor in interest, the action brought by him to quiet his title as against Bell's judgment, upon the ground that the court had no jurisdiction to render the judgment, is a direct, and not a collateral attack: *Choate v. Spencer*, 13 Mont. 127; 40 Am. St. Rep. 425; *Penrose v. McKinzie*, 116 Ind. 35; *Morrill v. Morrill*, 20 Or. 96; 23 Am. St. Rep. 95; *Buchanan v. Bilger*, 64 Tex. 589.

For the reason that the summons which was served upon Mrs. Goddard was not the summons ordered to be published, but one that issued two days after the order was made, we are of the opinion that the court never acquired jurisdiction over her. This was not a strict, nor even a substantial, compliance with the law. It follows that the judgment by default rendered against her is void, and the sale thereunder of the property in dispute in this action to defendant Bell gave him no title thereto.

Judgment and order refusing a new trial reversed, and cause remanded.

PROCESS—CONSTRUCTIVE SERVICE OF.—Service of summons by publication can be made only in the manner prescribed by statute. The statutory requirements must be successively and accurately taken to confer jurisdiction over the defendant: *Beckett v. Cuenin*, 15 Col. 281; 22 Am. St. Rep. 399, and note; *Laney v. Garbee*, 105 Mo. 355; 24 Am. St. Rep. 391; *Tunis v. Withrow*, 10 Iowa, 805; 77 Am. Dec. 117. An order for publication of a summons must be based upon an affidavit showing a cause of action, and that defendant is

a nonresident: *Beckett v. Cuenin*, 15 Col. 281; 22 Am. St. Rep. 399; and note; and the filing of such affidavit is a prerequisite to an authorized publication of summons: *Barber v. Morris*, 37 Minn. 194; 5 Am. St. Rep. 836. The record of a judgment must show service; it will not be presumed: *Pelton v. Platner*, 13 Ohio, 209; 42 Am. Dec. 197. An absence of legal service is jurisdictional, and without jurisdiction no judgment can be entered under which any rights can be lost or acquired: *Great West Min. Co. v. Woodmas etc. Min. Co.*, 12 Colo. 46; 13 Am. St. Rep. 204. A court acquires no jurisdiction of a nonresident defendant, without an authorized service of the summons: *Barber v. Morris*, 37 Minn. 194; 5 Am. St. Rep. 836.

JUDGMENT VOID FOR WANT OF JURISDICTION—ATTACK UPON.—A judgment by default is void for want of jurisdiction over the defendants where summons was not personally served on any of them, and there was an order of the court or judge for its service by publication: *People v. Greene*, 74 Cal. 400; 5 Am. St. Rep. 448. If it appears upon the face of the record that a judgment is void for want of jurisdiction, no title can be acquired by a purchaser at a sale under execution issued on that judgment: *Barber v. Morris*, 37 Minn. 194; 5 Am. St. Rep. 836. An execution issued under a void judgment is absolutely void, and may be attacked collaterally as well as directly: *Note to Johnson v. Gregory*, 31 Am. St. Rep. 910. A motion to vacate or set aside a judgment, on the ground that it is void, is a direct, and not a collateral, attack thereon: *Reinhart v. Lugo*, 86 Cal. 395; 21 Am. St. Rep. 52; *People v. Greene*, 74 Cal. 400; 5 Am. St. Rep. 448, and note, showing that the force of a judgment, whenever and wherever it is sought to be enforced, may be destroyed by showing that the court had no jurisdiction over the defendant. In other words, an attack upon the jurisdiction is equally efficient, whether collateral or direct. To attack a judgment for invalidity shown by the record itself does not constitute a collateral attack, though not in a direct proceeding to reverse, annul, or set aside such judgment: *Bailey v. Bailey*, 41 S. O. 337; 44 Am. St. Rep. 713.

DEEGAN v. DEEGAN.

[22 NEVADA, 185.]

GUARDIAN AND WARD—COLLATERAL ATTACK IN GUARDIANSHIP MATTER.—An objection, in an action upon a guardian's bond, to orders revoking the letters of the former guardian, and appointing another in his stead, is a collateral attack upon the judgment of the court in the guardianship matter.

GUARDIAN AND WARD—COLLATERAL ATTACK—PRESUMPTION OF JURISDICTION.—If the judgment of a court having original jurisdiction of a guardianship matter is collaterally attacked, the jurisdiction of that court is conclusively presumed, and evidence to the contrary is not admissible.

PROCESS—CITATION—SUMMONS—APPEARANCE.—The purpose of serving a citation, like the object of a summons, is to bring the party into court. If he voluntarily appears without it, such service is unnecessary.

GUARDIAN AND WARD—AUTHORITY OF ATTORNEY TO APPEAR—PRESUMPTION.—In a collateral attack upon a judgment removing a guardian, the authority of an attorney to appear for him is presumed, and the contrary cannot be shown.

GUARDIAN AND WARD—FAILURE TO ACCOUNT—REMOVAL OF GUARDIAN.—If a guardian fails to account after having been cited by the court to do so, he may be removed, under the statutes of Nevada, for such failure, without further notice.

GUARDIAN AND WARD—JUDGMENT—COLLATERAL ATTACK.—The judgment of a court having original jurisdiction in all cases relating to the persons and estates of minors cannot be successfully resisted until reversed or modified by some proceeding impeaching it.

GUARDIAN AND WARD—CONCLUSIVENESS OF JUDGMENT.—The judgment of a court having original jurisdiction in matters of guardianship is, until reversed, modified, or impeached, conclusive, not only against the guardian himself, but also against the sureties upon his official bond. Whatever binds and concludes the guardian equally binds and concludes his sureties.

PLEADING—NONJOINER—DEMURRER.—An objection of nonjoinder of parties plaintiff cannot be taken by demurrer, unless the complaint affirmatively shows that the party for whose nonjoinder the demurrer is interposed was living when the suit was commenced. If the fact does not appear upon the face of the complaint, the objection must be taken by answer.

PLEADING—NONJOINER—DEFECTIVE ANSWER.—An answer setting up a nonjoinder of parties plaintiff is defective if it does not show that the omitted party or parties were living at the time the complaint was filed.

GUARDIAN AND WARD—SUFFICIENCY OF GUARDIAN'S BOND.—The law regards not the form but the substance of a guardian's bond, and it will, therefore, be held sufficient to bind the obligors although it may be inartificially drawn or slightly defective.

GUARDIAN AND WARD—ACTION ON GUARDIAN'S BOND—DEFENSES.—If a guardian of several minors gives but one bond, and an action is brought thereon, the sureties cannot escape liability on the ground that the action is brought by only one of the obligees, or on the ground that the bond fails to comply with the law by reason of its being joint instead of several as to the obligees.

GUARDIAN AND WARD—GUARDIAN'S BOND—VALIDITY.—The fact that a guardian's bond is given for the benefit of more than one minor does not vitiate it.

PLEADING—DEFECTIVE ALLEGATIONS—WAIVER BY GENERAL DEMURRER.—A defective allegation in a complaint averring the breach of a guardian's bond on which an action is brought is waived by a general demurrer.

GUARDIAN AND WARD—BREACH OF BOND—LIABILITY OF SURETIES.—If a guardian converts the funds of his ward to his own use, there is a breach of his duty as guardian, and, therefore, a breach of his bond, for which the sureties are answerable, where such bond is conditioned for the faithful performance of the guardian's trust.

W. E. F. Deal, for the appellants.

C. E. Mack, for the respondent.

186 **MURPHY, C. J.** By his last will and testament, M. W. Deegan, deceased, nominated and appointed Thomas Deegan to be the guardian of the person and estates of his minor children,

to wit, John J. Deegan, Thomas Deegan, and Michael Deegan. On or about the twenty-third day of July, 1888, the said Thomas Deegan qualified as such guardian, by the filing of a bond in the penal sum of five thousand dollars for the faithful discharge of his duties as such guardian, and entered upon the discharge of his duties. This action is brought upon the bond for a failure of the guardian to discharge the duties of his trust. The defendants first contend that the court had no jurisdiction to remove the former guardian, and none to appoint the present guardian. On June 27, 1893, the plaintiff filed a petition in the district court stating that the guardian had never filed any account of his guardianship, and asking that he be compelled to do so. An order was thereupon made that a citation issue requiring the guardian to file such an account on or before July 15, 1893, or then show cause why he should not do so. On that day, F. M. Huffaker, Esq., an attorney at law, appeared for the guardian, and asked for further time in which to file the account. The time was accordingly extended to July 22d, the court stating in the order extending the time that, if the accounts were not then filed, the letters of guardianship would be revoked. July 25th, Mr. Huffaker again appeared; but, no account being forthcoming, an order was made revoking the letters, and removing the guardian. On the same day the present guardian was appointed.

The objection in this case to the orders revoking the letters of the former guardian, and appointing the present one, is a collateral attack upon the judgment of the court in the guardianship matter: *Van Fleet on Collateral Attack*, secs. 2, 3. In such a case, the jurisdiction of the district court is conclusively presumed, and evidence to the contrary is not admissible: *Black on Judgments*, sec. 271; *Van Fleet on Collateral Attack*, sec. 841. Upon another ground, also, the jurisdiction is sufficiently shown. The same as in case of a summons, service of a citation is only necessary to bring the party into court. If he voluntarily appears without it, such service is ¹⁹⁷ unnecessary. Here it appears from the record that the guardian did appear by attorney. To be sure, it was sought to be shown that the attorney had no authority to appear for him, but, upon collateral attack, such authority is presumed, and the contrary cannot be shown: *Carpentier v. Oakland*, 30 Cal. 446; *Weeks on Attorneys at Law*, secs. 196, 212. It is, however, argued that the proceeding in the guardianship matter was simply to compel the guardian to

account, and that in that proceeding the court had no jurisdiction, without further notice, to remove the guardian. Section 583 of the General Statutes provides that all the laws relative to the accounts of executors and administrators shall govern in regard to the accounts of guardians, so far as the same can be made applicable.

Section 2897 directs that if any executor or administrator neglects or refuses to appear and render an exhibit, after having been duly cited, an attachment may be issued against him, or his letters may be revoked, in the discretion of the court. That was the situation here. After having been, presumptively, duly cited to render an account, and upon the hearing of the matter by attorney, he still neglected or refused to do so. This authorized the court to remove him: *Deck's Estate v. Gherke*, 6 Cal. 668. Section 6 of article 6 of the constitution vests in the district court jurisdiction in all cases relating to the persons and estates of minors; and its judgment cannot be successfully resisted until reversed or modified by some proceeding impeaching it. It is conclusive, not only against the guardian himself, but also against the sureties upon his official bond. Whatever binds and concludes the guardian equally binds and concludes his sureties: *Brodrub v. Brodrub*, 56 Cal. 563; *Holland v. State*, 48 Ind. 391; *Garton v. Botts*, 73 Mo. 276; *Candy v. Hanmore*, 76 Ind. 125; *Lynch v. Rotan*, 39 Ill. 20; *State v. Slaughter*, 80 Ind. 597.

The appellants contend that the bond given by Thomas Deegan as guardian of the persons and estates of the minors being joint and several as to the obligors, but joint as to the obligees, this plaintiff cannot maintain this action without joining his co-obligees with him; and they interposed a demurrer to the complaint on the ground of defect of parties plaintiff, which was overruled. An objection of nonjoinder of parties plaintiff cannot be taken by demurrer unless the ¹⁸⁸ complaint shows that the party for whose nonjoinder the demurrer is interposed was living when the suit was commenced. It is held that it is not enough that the complaint is silent on the subject; the fact must affirmatively appear: *Estee's Pleading and Practice*, sec. 3102; *Bliss on Code Pleading*, sec. 411. If it does not appear upon the face of the complaint, the objection must be taken by answer. This the defendants attempted to do by an allegation in their answer that they were not liable to the plaintiff, but, if any liability existed, it was to the obligees named in the bond

jointly, and not severally to plaintiff. This allegation is defective, in that it does not show that the omitted party or parties were living at the date of filing the complaint: *Wilson v. State*, 6 Blackf. 212; *Stockwell v. Wager*, 30 How. Pr. 273; *Levi v. Haverstick*, 51 Ind. 236; *National Distilling Co. v. Cream City Importing Co.*, 86 Wis. 352; 39 Am. St. Rep. 902; *Palmer v. Field*, 76 Hun, 229; 27 N. Y. Supp. 737; *State v. Goodnight*, 70 Tex. 688; *Furbish v. Robertson*, 67 Me. 38.

Pleas in abatement have always been regarded with disfavor, by reason of the fact that they are dilatory in their nature, and seek to defeat the action upon technical grounds. The rule, therefore, in relation to the degree of certainty required, both as to form and substance of such pleas, requires fullness and particularity in the statement, leaving nothing to be supplied by intendment or construction; and the pleadings should show that it was necessary, in order to protect the rights and interest of the pleader, that the omitted party should be brought into court.

The appellants argue that the bond given in this case is not such a bond as is required to be given by law, and is for that reason null and void. There is no allegation in the answer, nor is there any statement in the points and authorities submitted to us by the counsel, pointing out wherein this bond is defective, except, as we can infer from his argument, that it is so by reason of the fact that it is joint in so far as the obligees are concerned. It has been held in a number of well-considered cases that a guardian's bond, though inartificially drawn or slightly defective, will be held sufficient to bind the obligors; and we cannot but think that there is manifest wisdom in the rule that the law will regard, in transactions like the present, not the form, but the substance, ¹⁰⁹ of the instrument; nor does it seem to us that such a rule is ever, in any of its numerous applications, of more worth than when it is employed as a safeguard to persons who are unfortunate, and must of necessity be represented by agents appointed by the court and designated guardians. It must strike anyone as preposterous that the bond given by a guardian can be defeated by a slight inaccuracy—by the addition or omission of a word or sentence. The present case will afford a fair illustration of the practical operation of such a pernicious principle. This guardian had the bond prepared by an attorney of his own choosing. The principal and his bondsmen signed it knowing that they were obligating themselves—the principal

that he would faithfully perform all the duties of his trust, in accordance with law and the orders of the court, and the bondsmen binding themselves that they would be responsible for any defalcation or neglect of duty on the part of their principal. This instrument was presented to the judge for his approval. It was approved by the judge, and filed in the office of the clerk; and now, after the lapse of many years, when it becomes necessary to sue the bondsmen, the property of the minors having been misappropriated by the guardian, the bondsmen endeavor to avoid their obligation by raising the technical objection that one of the obligees cannot maintain the action without joining all others named in the bond with him. As the said bond was given subject to conditions prescribed by the statute, which conditions have not been fulfilled, in our judgment, law and public policy demand that such defenses should not prevail in this character of cases.

The case of *Ordinary v. Heishon*, 42 N. J. L. 17, was an action upon a guardian's bond. The defense was, that the bond did not conform to the statute, by reason of the fact that but one bond was given for the guardianship of two minors, and was defective in other particulars. It was admitted that the statute of the state required a separate bond with respect to the estate of each minor. The court said: "The act of tendering such a bond as this, as the security called for by the statute, was an act of great carelessness on the part of the guardian and his sureties, and the acceptance of such instrument by the surrogate or the court ²⁰⁰ was conduct still more censurable; but it would seem to be irrational in the extreme to conclude that, by reason of such improprieties, these sureties are to be absolved from all responsibility, and these innocent minors be left without redress. We have not adopted in this state the doctrine that, because a bond of this class does not conform to the statutory definition it becomes, for that reason alone, unenforceable. In such a condition of things, the strong leaning of the courts has been to hold such instruments valid, to the full extent of their terms, so far as they embody the statutory policy, as voluntary obligations."

The case of *Pursley v. Hayes*, 22 Iowa, 28, 92 Am. Dec. 350, was a proceeding to set aside a guardian's sale. One of the objections raised was that the bond was a joint bond, and hence void. In passing on this point, the court said: "Next is the objection that the guardian was appointed for the wards jointly,

and the bonds are for their security in the same manner, and certainly nothing has been more common in our practice than to appoint one guardian for all minors thus interested, and no rule of the statute can be found forbidding it." The case of *Hooks v. Evans*, 68 Iowa, 54, was an action by one ward against her guardian and sureties. On the trial of the case in the nisi prius court, the sureties were released, and judgment entered against the guardian. The plaintiff appealed. In reversing the judgment, the appellate court said: "One question remains to be determined, and that is as to the amount for which these sureties are liable in this case. The judgment against the guardian was for seven hundred and thirty-six dollars and twelve cents. The penalty of the bond is six hundred dollars. The judgment against the sureties might be for the amount of the penalty of the bond, but for the fact, which remains to be stated, that Evans was appointed guardian, not only for the plaintiff, but for three others, and the bond in question was given for their benefit, and was the only one given for the four. It is manifest that the aggregate liability of the sureties to the four wards could not exceed six hundred dollars. The other three wards are not made parties, and without them no judgment can be rendered by which their rights can be impaired. It follows that the court below should have rendered judgment against the sureties for one hundred and fifty dollars, and only that."

Although the bond in this case is not in strict conformity ²⁰¹ to the statute, yet the fact that it was given for the benefit of more than one minor does not vitiate it. The practice in this respect appears to be general and uniform in all courts authorized to take such bonds. The omission of the word "severally" does not weaken the bond, release the sureties, nor, in our opinion, deprive the individual ward from maintaining an action either against the guardian or his sureties. The nature of the guardian's duties is several, and would require a several inventory, a several accounting, and payment over to the wards, as they severally arrive at full age.

The appellants contend that there is no allegation in the complaint that the decree in the guardianship matter found the sum for which the judgment is given to be due the plaintiff; but in this counsel is mistaken, for the complaint distinctly charges "that the final account of Thomas Deegan as former guardian of plaintiff has been settled in the above court, and

five hundred and seventy-four dollars and ten cents found to be due plaintiff thereon."

Counsel also contends that there is no allegation of a breach of the conditions of the bond; that there is no allegation that the money has not been paid to the plaintiff; and that, consequently, the complaint does not state facts sufficient to constitute a cause of action. To this contention, however, we think there are two sufficient answers: 1. The complaint does allege "that, after qualifying as such guardian, the said defendant Thomas Deegan received as said guardian, of the person and estate of plaintiff, the sum of twelve hundred and eighty-six dollars and forty cents of the moneys belonging to plaintiff, and has unlawfully converted the sum of five hundred and seventy-four dollars and ten cents thereof to his own use." The demurrer is general so far as this point is concerned, and the defect now relied upon is not specially pointed out as such. There can be no question that the allegation just quoted was intended as charge of a breach of the conditions of the bond. Admitting that it is not sufficient as such, it is still more a defect of form than of substance, and is quite different from a complaint that contains no allegation of a breach. As such it was waived by the general form of the demurrer: *Grant v. Sheerin*, 84 Cal. 197; *Bliss v. Sneath*, 103 Cal. 43; 2. The office of guardian is one of trust and obligation. He is bound to act for the best interest of his ward, and not for his own; and, whenever he seeks to gain an advantage at the expense of his ward, such ²⁰² act is fraudulent. It was the duty of the guardian to keep the money of his ward separate and intact from his own funds, and invest the same for the best interest of his ward. He had no right to use it in his own private business, nor for his own purposes; and, if he did so, such use was a breach of his duty: 1 *Perry on Trusts*, sec. 275. The bond was that he should faithfully execute the duties of his trust according to law; and if he converted the money to his own use, as charged in the complaint, there was clearly a breach of his duty as such guardian, and consequently a breach of the condition of the bond, for which his sureties are responsible: *State v. Roberts*, 21 Ark. 263; *Irwin v. Backus*, 25 Cal. 221; 85 Am. Dec. 125.

It follows that Thomas Deegan was legally removed as guardian and by such removal his trust expired, and the conditions of his bond were broken. Henry Neligh, having been selected

by the minor, and at his request appointed by the court, is the legal guardian.

The judgment and order appealed from are affirmed, and it is so ordered.

GUARDIAN AND WARD—REMOVAL OF GUARDIAN.—A court of chancery has power to remove guardians upon sufficient cause being shown: Note to Matter of Van Houten, 29 Am. Dec. 715, showing that the power of removal is, in this country, generally regulated by statute.

AN ATTORNEY'S APPEARANCE IS PRESUMED to be authorized, and this presumption must be overcome by proof before a judgment resting upon such appearance will be declared void or set aside: See monographic note to Bunton v. Lyford, 75 Am. Dec. 147, discussing the validity of judgments where the appearance of attorneys is unauthorized.

PLEADING.—NONJOINDER OF PARTIES must be raised by demurrer or answer. If the defect of parties appears on the face of the complaint, objection must be taken by demurrer, and, if not so taken, it is waived, and cannot be taken advantage of by answer. If the nonjoinder of parties does not so appear, objection must be taken by answer, and if not so taken, it is waived, and cannot be taken at the trial: Note to Zabriskie v. Smith, 64 Am. Dec. 561; Great West Min. Co. v. Woodmas etc. Min. Co., 12 Col. 46; 13 Am. St. Rep. 204, and note.

GUARDIAN AND WARD—CONVERSION BY GUARDIAN—LIABILITY.—If a guardian misappropriates, misapplies, or converts moneys of his ward, the act is a breach of his bond for which he and his sureties are answerable. The sureties undertake that the guardian will faithfully perform his duty toward the ward respecting all moneys belonging to the latter which come into the hands of the former: State v. Branch, 134 Mo. 592; 56 Am. St. Rep. 533, and note.

HUMBOLDT COUNTY v. LANDER COUNTY.

[22 NEVADA, 248.]

EQUITY—JURISDICTION — DISPUTED BOUNDARIES — COUNTIES.—A court of equity does not have jurisdiction of a question of boundary simply because it is in dispute. In addition to this, there must be shown some equitable circumstance which has arisen from the conduct, situation, or relations of the parties, and this principle applies to disputed county boundaries.

EQUITY—JURISDICTION — DISPUTED BOUNDARIES.—Equity has jurisdiction of a question of disputed boundary where the boundary has become confused through the fraud of the defendant, or where the duty of preserving it rests upon him, or where the exercise of jurisdiction will avoid a multiplicity of suits.

EQUITY — JURISDICTION — DISPUTED BOUNDARIES — COUNTIES.—In a dispute between two counties as to the boundary line between them, the mere fact, in addition to the one of dispute, that one of the counties is claiming jurisdiction over the disputed tract, is collecting taxes upon property situated therein, and is claiming the right to continue to do so, does not confer equity jurisdiction in the matter.

JUDGMENT—DECREE—EFFECT OF, AS TO THOSE NOT PARTIES.—A decree in equity as to the situation of a disputed county boundary line does not determine that question as to anyone not a party to the action.

W. D. Jones, district attorney of Lander County, D. S. Truman, and J. F. Dennis, for the appellant.

M. S. Bonnifield, for the respondent.

256 MURPHY, C. J. Action in equity to establish the boundary line between plaintiff and defendant. The complaint sets out, by reference to fixed points and monuments, what the plaintiff claims to be the true line, as established by the joint action of the two counties, and as afterward recognized and fixed by the legislature; that subsequently, under the act of March 2, 1887 (Stats. 1887, p. 97), directing the surveyor general to make a survey of the railroads in this state, and to place monuments at the points where any railroad crosses a county line, that officer placed a monument at a point on the Central Pacific railroad two and seven-twentieths miles west of where the true boundary crossed that road, and that thereby a contention has arisen between said counties as to where the true line is, and that each claims jurisdiction over the territory lying between those two points and extending the entire length of the boundary between them; that the defendant claims jurisdiction over the tract, and during the years 1892 and 1893 has assessed the property situated therein for the purpose of taxing the same, has collected the taxes thereon, and claims the right so to do.

The defendant demurred, upon the grounds that the court had no jurisdiction, and for want of facts sufficient to constitute a cause of action. The demurrer was overruled, and a decree entered fixing the boundary in accordance with the allegations of the complaint. The correctness of the ruling upon the demurrer is the only point necessary to be noticed to dispose of this appeal.

In many of the states, the legislatures have provided specially for ascertaining and fixing the boundaries of counties where they are in controversy. They have sometimes conferred jurisdiction in such cases upon the courts, but that has not been done in this state. We have several statutes bearing upon the matter (Gen. Stats., sec. 1854; Stats. 1862, p. 93; Stats. 1866, p. 130), but none of them give any power to the courts to settle the controversy. In the absence of a statute to that effect, we have been cited to no precedent sustaining such an action upon the part of

erty in the disputed tract; that it is highly important that it should be known to which county it belongs, because the right to prosecute crime, to serve process therein, the exercise of the elective franchise, and many other rights for and against people and property therein, all depend upon that fact. All this may be freely admitted, but, aside from the fact that none of them are grounds of equitable jurisdiction, it is, perhaps, one of the greatest objections to this action, as it seems to us, that it settles none of these questions. We know of no principle upon which it can be claimed that the decree entered in this action determines the situation of the boundary as against any one not a party. It would not even be admissible for or against either party to a criminal proceeding, to an action to recover delinquent taxes, or in an election contest; nor would it prevent the assessor of Lander county from assessing property therein. The law fixes the boundary. All that a court could possibly do would be to determine the fact of where it is so fixed, and as upon this would often depend very important rights of others, of which they could not be deprived without their day in court, judgment upon the point can conclude no one not a party to the action.

It is unnecessary to determine how far, if at all, manors and parishes in England are public corporations, so as to make the decisions there concerning their lost or confused boundaries in point in this action; but they are, at least, somewhat analogous, and as will be seen from the citation from *Speer v. Crawter*, 2 Meriv. 410, it is in such cases that the exercise of jurisdiction by a court of equity is pronounced particularly pernicious.

After a careful consideration of the points presented on this appeal, we are satisfied that the court erred in overruling the defendant's demurrer. It is therefore ordered that the judgment of the district court be reversed, and the demurrer to the complaint sustained.

EQUITY—JURISDICTION—DISPUTED BOUNDARIES.—To give a court of equity jurisdiction in cases of disputed boundaries, there must exist not only a dispute as to the boundary line, but also some equity superinduced by the acts of the parties, such as fraud, gross negligence, omission, or misconduct: See monographic note to *Johnson v. Archibald*, 22 Am. St. Rep. 36, on surveys; *Doggett v. Hart*, 5 Fla. 215; 58 Am. Dec. 464; *Stuart v. Coalter*, 4 Rand. 74; 15 Am. Dec. 731. This subject is discussed at length in the note to *Stuart v. Coalter*, 15 Am. Dec. 745-754.

JUDGMENT—PARTIES.—A judgment in a proceeding does not conclude one not a party thereto: *Short v. Galway*, 83 Ky. 501; 4 Am. St. Rep. 163.

ROBERTS v. GREER.

[22 NEVADA, 318.]

A HOMESTEAD RIGHT DOES NOT CEASE UPON THE DEATH OF EITHER SPOUSE.—The homestead right of a husband or wife upon community property does not cease upon the death of either of them. Hence, if the wife files a declaration of homestead upon community property, on which they are both residing, and where they continue to live until the wife's death, the homestead remains a homestead in his hands, and is exempt from levy and sale for his debts, while he continues to reside upon it, although he has no children or other dependent relatives living with him.

Action to annul a sheriff's sale, and to enjoin the issuance of a sheriff's deed. Hiram W. Roberts, the plaintiff, and Johanna Roberts, his wife, were, on December 16, 1879, living upon and occupying the land in controversy, and which was community property. On the date named, Johanna filed a declaration of homestead on the premises, and she and her husband continued to reside thereon until October 25, 1893, when the wife died. The husband continued to live upon and to occupy the land. There were no children, and the husband had no dependent relatives living with him after his wife's death. There had been, apparently, no administration upon the wife's estate. The value of the premises did not exceed five thousand dollars. The defendant Greer obtained a judgment against the plaintiff on July 25, 1893, and an execution thereunder was issued on October 27, 1893. The defendant Caughlin, as sheriff, sold the land under this writ to the defendant Greer, and it was alleged that, upon the expiration of the period of redemption, he intended to execute a sheriff's deed to the purchaser. There was a judgment for the plaintiff, to the effect that the sale was void, and enjoining the sheriff from executing any deed thereunder. The defendants appealed.

J. L. Wines and Torreyson & Summerfield, for the appellants.

William Webster and Goodwin & Dodge, for the respondent.

327 **BIGELOW, C. J.** The question for decision in this case is, whether, upon the death of the wife, the homestead of the parties upon community property remains in the hands of the childless husband as a homestead, and as such exempt from levy and sale for his debts. The answer depends upon the construction of our homestead law.

The first section of the act, as amended in 1879 (Stats. 1879, p. 140; Gen. Stats., sec. 539), provides that the husband and

wife or either of them, or other head of a family, may make and file a declaration of homestead, and that thereafter "the husband and wife shall be deemed to hold said homestead as joint tenants; provided, that if the property declared upon as a homestead be the separate property of either spouse, both must join in the execution and acknowledgment of the declaration; and if such property shall retain its character of separate property until the death of one or the other of such spouses then and in that event the homestead right shall cease in and upon such property, and the same belong to the party (or his or her heirs) to whom it belonged when filed upon as a homestead.

Section 4 of the act (Stats. 1879, p. 141; Gen. Stats., sec. 542) provides as follows: "The homestead and all other property exempt by law from sale under execution, shall, upon the death of either spouse, be set apart by the court as the sole property of the surviving spouse, for his or her benefit, and that of his or her legitimate child or children; and in the event of there being no surviving spouse, or legitimate child or children of either, then the property shall be ³²⁸ subject to administration, and to the payment of his or her debts or liabilities; provided, that the exemption made by this act and the act of which it is amendatory shall not extend to unmarried persons except when they have the care and maintenance of minor brothers or sisters or both, or of a brother's or sister's minor children, or of a father or mother, or of grandparents, or unmarried sisters living in the house with them; and in all such cases the exemption shall cease upon the cessation of the terms upon which it is granted; and upon the death of such unmarried person the property shall descend to his or her heirs, as in other cases, unless disposed of by will, subject to administration and the payment of debts and liabilities."

It may be admitted that the statute is by no means clear upon the point involved in this action. Generally, it is very crude, and many of its provisions conflicting to the last degree. Through this maze the courts must thread their way as best they may, and, in endeavoring to carry out what appears to be the spirit of the law, their decisions must necessarily, sometimes, seem to fall but little short of judicial legislation. The language used by the supreme court of Texas is very applicable to the situation here. It said: "The homestead estate was one unknown to the common law, and is of very recent origin, having been created by statute and under the construction given

by the courts. As might have been reasonably expected in the legislation upon a new subject matter, the statutes did not in express terms anticipate and provide for every possible phase of the question, and the courts have been called upon to construe and apply the law to new cases as they would arise. This construction has almost invariably been a liberal one, and designed to carry out the beneficent purposes and intention of the legislature. This court has repeatedly called attention to the necessity of more specific legislation on the subject, and in the absence of it has been forced to decide cases not so much from the letter of the law as from its evident spirit and intention. These decisions have not been made in a spirit of judicial legislation, but in an anxious desire and effort, by analogy and otherwise, to arrive at a proper construction of the constitution and laws": *Blum v. Gaines*, 57 Tex. 119, 121. Viewing the law in the liberal spirit ³²⁹ here indicated, it seems to us there is more reason for concluding the legislature intended the homestead in the hands of the surviving husband to be exempt from execution than the contrary.

The constitution, article 4, section 30, provides that "a homestead, as provided by law, shall be exempt from forced sale under any process of law, and shall not be alienated without the joint consent of husband and wife when that relation exists." Under this provision, the conditions upon which a homestead shall be granted have been left entirely to the legislature. While that body has seen fit to limit the right to initiate a homestead to married persons, and to those who are heads of families, there seems nothing to prevent its being extended to others who are not in either situation. If it could do this, it could extend it to some classes and not to others. It could provide that a homestead once created should continue under some circumstances, and not under others.

The first section of the act quoted above provides that "the husband and wife shall be deemed to hold said homestead as joint tenants." As used in this statute, the word "homestead" may be defined as meaning not only the property—the real estate—occupied as the home, but also the right to have it exempted from levy and forced sale. In case of a husband and wife, the homestead is a home that cannot be taken from the occupiers for the debts of either or both of the spouses. It is this "homestead" that they are to hold as joint tenants. One of the fundamental incidents of a joint tenancy is the right of sur-

vivorship. If, then, when the legislature provided that they should hold the homestead as joint tenants, if they understood at all the meaning of the language used, as we must presume they did, they must have meant that the survivor should not only succeed to the property which constituted the homestead, but also to the right to hold it exempt from forced sale. If not, they would not hold the "homestead" as joint tenants, but merely the property covered by the homestead right.

It will be noticed, further, that the same section also provides that where the property declared upon as a homestead is the separate property of either spouse, and shall remain such until the death of one of the parties, the "homestead right" ³³⁰ in such property shall thereupon cease. From this, upon the principle that what is enumerated excludes what is not, it seems quite clear that the legislature must have intended that in case of community property this "homestead right" should not cease upon the death of one of them.

In section 4 it is again the "homestead" that upon the death of either spouse is to be set apart as the sole property of the survivor, and it is further provided that, in case there is no surviving spouse nor children, the "property" is to become subject to administration. This shows that the attention of the legislature must have been particularly called to the fact that there was a distinction between the homestead and the property upon which the homestead right rested, and that they did not use those terms indiscriminately.

In *Tyrrell v. Baldwin*, 78 Cal. 470, 476, speaking of a provision of the code, the court said: "That section provides that 'the court may [shall] of its own motion, or on petition therefor, set apart for the use of the surviving husband or wife, or in case of his or her death, to the minor children of the decedent, all the property exempt from execution, including the homestead selected, designated, and recorded,' etc. Here the quality of the exemption is clearly impressed upon the homestead set aside. It would not be a homestead, it would be wanting in the main feature which recommends it to favor, if, upon the death of the head of the family, it were no longer protected by the law of exemption. There is greater necessity for such protection after the death of one of the spouses than before."

An argument leading to the same result may also be drawn from the provision that, where there is no surviving spouse nor children, the property shall become subject to administration

and distribution to the heirs. Unless, in this provision, the legislature intended to provide for a case where both husband and wife died at the same instant, which is hardly supposable, it must have contemplated that there would be a time during which the homestead would continue to exist, when but one of them would be alive, and it is only after the death of the survivor that the homestead property is to be distributed to the heirs. In *Smith v. Shrieves*, 13 Nev. 303, this court decided that, upon the death of one of the spouses, the children took no interest in the homestead. ³³¹ If that decision is correct, then the fact that there are or are not children cannot alter the estate that comes to the surviving husband or wife. If it would not, then no case can be thought of where the homestead would continue after the death of one of the spouses, if it would not here.

Defendants' counsel, admitting what is really beyond controversy, that upon the death of the wife the title to the homestead property vested absolutely in the husband, found their argument that it is not thereafter exempt from levy and sale for his debts principally upon the language of the first proviso of section 4, where it directs that "in all such cases the exemption shall cease upon the cessation of the terms upon which it is granted." But the view we take of this provision is that it really strengthens the opposite position. We are of the opinion that this proviso is simply a limitation upon the first section, wherein that section provides for a homestead for an unmarried person who is the head of a family. Without this limitation the first section might be construed to apply to cases where an unmarried person had living with him others who were not relatives. This was carefully guarded against—so carefully, in fact, that it seems to even prevent a surviving husband or wife with dependent children from ever securing a homestead in their own right after the death of the other; and then the clause in question was inserted for the purpose of providing for the termination of the unmarried persons' homestead when they no longer have dependent relatives living with them. This, we think, is all that was intended by this clause, and the care of the legislature to provide for the termination of such a homestead may be considered an indication that they did not intend one granted to a married person to terminate upon the cessation of the terms upon which it was granted.

We are aware that in *Estate of Walley*, 11 Nev. 260, 266, the majority of the court expressed the opinion that the con-

struction of this statute contended for by defendants' counsel was correct, but the point was not involved in that case, and, of course, was not decided. What was there said was stated only by way of argument as to the proper construction to be placed upon another statute, and probably did not receive the consideration usually given to points actually decided. Since then, in *Smith v. Shrieves*, 13 Nev. 303, the court ³³² has held that children take no interest in a homestead; and if, as heretofore remarked, this was correctly decided, then the existence or non-existence of children cuts no figure in the right to a homestead, and, if a childless widow or widower cannot have one, then such a person with children cannot do so. But certainly the legislature cannot have deliberately intended to exclude a widow, or a widower, with children, from all benefit of the homestead act, and yet, as we have seen, if they are not granted a homestead by virtue of their survivorship, they cannot afterward secure one.

We think that stronger arguments against the view we have taken may be drawn from the general policy of the homestead act, which seems to aim only at securing a homestead for a family, and not for individuals, from the fact mentioned by Justice Beatty in his dissenting opinion in *Smith v. Shrieves*, 13 Nev. 303, that, when our legislature adopted our law of 1865, they apparently preferred to follow the California act of 1860, which, at best, is not clear upon this point, in preference to the California amendment of 1862, which is clear and definite that the homestead in the hands of the surviving spouse is exempt from all debts incurred prior to the death of the other; from the fact that the legislature clearly did not intend that a homestead in the separate property of either of the spouses should continue after the death of one, and consequently, as community property virtually becomes separate property after such death, no greater reason exists for granting a homestead in that than exists in regard to property which has always been separate; from the fact that no provision has been made for abandoning such a homestead, and under the provisions of section 2, taken literally, if a homestead exists at all to a surviving husband or wife, it never can be abandoned, and, as this cannot have been intended, the legislature must have intended that no such homestead should exist at all.

But strong as some of these reasons, and perhaps others that could be suggested, are, we consider those on the other side stronger still, and consequently hold that view to be the law.

While not strictly in point, yet as to some extent supporting the views here expressed, and showing that other courts ³³³ upon statutes more or less like our own have come to the same conclusion, we cite *Town v. Rumsey* (Wyo. March 14, 1894), 35 Pac. Rep. 1025; *Ellis v. Davis*, 90 Ky. 183; *Keyes v. Cyrus*, 100 Cal. 322; 38 Am. St. Rep. 296; *Silloway v. Brown*, 12 Allen, 34; *Kimbrel v. Willis*, 97 Ill. 494; *Blum v. Gaines*, 57 Tex. 119; *Waples on Homesteads*, 82, et seq.

The judgment is affirmed.

HOMESTEAD—RIGHT OF SURVIVOR.—The death of one of the spouses in no manner alters the estate or character of the homestead in community property: *Sanders v. Russell*, 86 Cal. 119; 21 Am. St. Rep. 28, and note.

DENNIS v. CAUGHLIN.

[22 NEVADA, 447.]

APPEAL.—IT IS SUCH ERRORS ONLY as the appellant complains of that can be considered on appeal.

ELECTIONS—AUSTRALIAN BALLOT LAW—RULE AS TO DISTINGUISHING MARKS.—A mark on a ballot, which satisfactorily appears to have been inadvertently or accidentally made, and not for an evil purpose, is not within the meaning of a statute requiring the exclusion, from the count, of all ballots having thereon marks not authorized by law, and should not be construed as an identifying or distinguishing mark.

ELECTIONS — AUSTRALIAN BALLOT LAW — WHAT MARKS WILL NOT AVOID A BALLOT.—The fact that a ballot was written by a hand unaccustomed to the use of a pencil, or that there was awkwardness in the use of a pencil, or carelessness in the preparation of the ballot, or an apparent attempt to retrace a clumsily made cross, or X, or an effort to make it more certain, and, in doing so, employing more lines than are necessary to make a cross properly, or a slightly blurred spot to correct a mistake, not indicating an intention to identify the ballot, or a slight erasure for the same purpose, or a cross made when the ballot paper was defective, and, to avoid the defect, and to make the vote more certain, a second cross was made, or a slight pencil mark, clearly made by accident, and not design, or a stain of tobacco, will not avoid the ballot.

ELECTIONS — AUSTRALIAN BALLOT LAW — WHAT MARKS WILL AVOID A BALLOT.—A ballot having blurred spots, plainly made by a lead pencil, which may have been made for the purpose of canceling a cross, but which might have been made also for identification, or a cross not opposite the name of any candidate, or two or more crosses instead of one, or a number of crosses in a bunch, or a mark not a cross, or blue lead pencil marks instead of black ones, or a straight line, thus,—over the word, "No." or a word written where there should be a cross, must be rejected.

Thomas E. Haydon and Robert M. Clarke, for the appellant.

Torreyson & Summerfield, for the respondent.

⁴⁵² BELKNAP, J. This is a contest brought by John H. Dennis, an elector of Washoe county, against the respondent, to determine whether John Hayes or W. H. Coughlin is legally entitled to the office of sheriff of Washoe county. According to the official returns, respondent received the highest number of votes, and was declared elected by the board of canvassers. At the trial, it was stipulated that all returns and all ballots of each and every precinct in the county should be examined and considered, and legal ballots counted for whom cast, and under this stipulation the trial was had. Respondent recovered judgment.

⁴⁵³ One of the first questions to be determined is, whether we can review all the rulings of the district court or only such as have been assigned as error by the appellant. It has frequently been decided that a party who has not appealed from a judgment cannot, on appeal by the opposite party, obtain a review of the rulings of the court against him. In *Dougherty v. Henarie*, 47 Cal. 9, the plaintiff offered to dismiss the action as to one of the defendants, who objected, and the court thereupon denied the motion to dismiss, the plaintiff excepting. Said the court: "But he cannot avail himself of his exception on this appeal. Having submitted to the judgment, and prosecuted no appeal from it, he cannot, on an appeal by the defendant, review the rulings of the court which he claims are to his prejudice": *Maher v. Swift*, 14 Nev. 324; *Moresi v. Swift*, 15 Nev. 215; *Nesbitt v. Chisholm*, 16 Nev. 40. Again, in *Whittam v. Zahorik*, 91 Iowa, 23, 51 Am. St. Rep. 317, the supreme court of Iowa said in an election contest case: "The appellee complains that ballots similar in marking to some of those we hold should have been excluded were offered by the contestant, and counted for him; but, as the incumbent does not appeal, we cannot determine the question he thus presents." Our conclusion is, that only such errors as the appellant complains of can be considered upon this appeal.

The errors assigned by the appellant embrace the rulings of the district court upon thirty-two ballots. These rulings involve a construction of the statute of 1891 generally known as the "Austrian ballot law." The provisions of the statute relating to the preparation of the ballot by the elector, and its rejection in certain cases, are as follows:

"Sec. 20. On receiving his ballot, the voter shall immediately retire alone to one of the places, booths, or compartments. He shall prepare his ballot by marking a cross or X after the name of the person for whom he intends to vote for each office. In case of a constitutional amendment or other question submitted to the voters, the cross or X shall be placed after the answer which he desires to give. Such marking shall be done only with a black lead pencil. Before leaving the booth or compartment the voter shall fold his ballot in such manner that the water mark and the number ⁴⁵⁴ of the ballot shall appear on the outside, without exposing the marks upon the ballot, and shall keep it so folded until he has voted. Having folded his ballot, the voter shall deliver it to the inspector, who shall announce the name of the voter and the number of his ballot. The clerk having the registry list in his charge, if he finds the number to agree with the number of the ballot delivered to the voter shall repeat the name and number, and shall mark opposite the name the word 'Voted.' The inspector shall then separate the strip bearing the number from the ballot, and shall deposit the ballot in the ballot-box. Said strip and number shall be immediately destroyed."

"Sec. 26. In counting the votes, any ballot not bearing the water mark, as provided in this act, shall not be counted, but such ballot must be preserved and returned with the other ballots. When a voter marks more names than there are persons to be elected to an office, or if for any reason it is impossible to determine the voter's choice for any office, his vote for such office shall not be counted. Any ballot upon which appears names, words, or marks written or printed, except as in this act provided, shall not be counted."

Statutes more or less similar in their nature have been adopted in many of our sister states, and a reference to some will aid in the construction to be placed upon our law.

In *In re Vote Marks*, 17 R. I. 812, the supreme court of Rhode Island said: "A cross is the only mark authorized by the statute to be used to designate the person voted for, and it is only by force of the statute that it gets its significance for that purpose. If another mark be used there is nothing to certify its meaning. It might be conjectured that it was used inadvertently instead of a cross, but, in our opinion, such a conjecture would not justify the counting of it. The statute declares: 'No voter shall place any mark upon his ballot by which it may be afterward identified

as the one voted by him.' If marks other than crosses were counted, they might be used both to answer the purpose of crosses and to identify the ballots."

In *Whittam v. Zahorik*, 91 Iowa, 23, 51 Am. St. Rep. 317, in considering a law of this nature adopted in Iowa, the court said: "It is not practicable to adopt a rule in regard to identifying marks ⁴⁵⁵ which would be applicable in all cases. It will not do to say that all ballots which bear marks not authorized by law should be rejected. All voters are not alike skillful in marking. Some are not accustomed to using a pen or pencil, and may place some slight mark on the ballot inadvertently, or a cross first made may be clumsily retraced. It is evident that in such cases, and in others where the unauthorized mark is not of a character to be used readily for the purpose of identification, the ballots should be counted; but where the unauthorized marks are made deliberately, and they may be used as means of identifying the ballot, it should be rejected."

In Indiana it was provided that the voter should indicate his choice by stamping a certain square opposite the candidate's name, and, if he desired to vote for all candidates of one party, should place the stamp on the square preceding the party designation. The court held that the provision concerning the use of the stamp was mandatory, the stamping of the square being the only method prescribed by which the voter can indicate his choice. The statute was amended at the next session of the legislature so that a stamp placed upon a ballot which does not touch a square thereon was declared to be a distinguishing mark, and was not to be counted. The court said: "This amendment was intended, we think, to make certain that which, prior to its passage, was left in some measure, to construction; but it only makes certain that which was intended by the legislature when it passed the original section": *Parvin v. Wimberg*, 130 Ind. 561; 30 Am. St. Rep. 254.

In Maine, the statute provides that "the voter shall prepare his ballot by marking on the appropriate margin or place a (X) as follows: He may place such mark opposite the name of a party or political designation; or he may place such mark opposite the name of the individual candidates of his choice for each office to be filled": Me. Stats. 1891, c. 102, sec. 24. The court said of this provision: "Its distinguishing feature was its careful provision for a secret ballot. The leading purpose of it was to give the elector an opportunity to cast his vote

in such a manner that no other person would know for what candidate he voted, and thus to protect him against all improper influences, and enable ⁴⁵⁶ him to enjoy absolute freedom from restraint and entire independence in the expression of his choice." "If it be conceded that the intention of the voter may be correctly inferred from the mark actually made by him in each of these instances, it is still a fatal objection to the ballot that such an irregular and unauthorized mode of marking it might readily be, and probably would be, agreed upon with the voter as a distinguishing mark to identify the ballot cast by him, whenever identification was desired. Such a palpable disregard of the plain requirements of the act strikes at the root of the secret ballot system": *Curran v. Clayton*, 86 Me. 42.

These decisions show that the only way the voter can indicate his choice is by a cross or X, used in the manner required by the statute. The statute of this state is less liberal in its terms than those of the other states, and if its provisions relating to "marks," in the twenty-sixth section of the act, are to be literally enforced, many voters would be disfranchised. This section provides that any names, words, or marks, except as in the act provided, shall invalidate the ballot. Under the terms of the statute, any mark, although innocently or accidentally made, would come within its provisions. The evils against which the statute was directed were bribery and intimidation, and to repress these the secret ballot was adopted. Its aim was that the ballot should not disclose by whom it was cast, and for this reason all of the means by which it may be identified were interdicted.

Courts should construe statutes with such liberality, if practicable, as to advance the object and correct the evils which the legislature had in view. A mark satisfactorily appearing to have been inadvertently or accidentally made, and not for an evil purpose, is not within the meaning of the statute, and should not be construed as an identifying or distinguishing mark; and we think the statute should be read as if this qualification were attached to it. Adopting this view, a ballot written by a hand unaccustomed to the use of a pencil, or awkwardness in its use, or carelessness, or an apparent attempt to retrace a clumsily made cross X, or an effort to make it more certain, and in doing so employing ⁴⁵⁷ more lines than are necessary to properly make a cross, or a slightly blurred spot to correct a mistake, not indicating an intention to identify the ballot, or a slight erasure

for the same purpose, or cross made when the ballot paper was defective, and to avoid the defect, and make the vote more certain, a second cross was made, or a slight pencil mark, clearly made by accident, and not design, or a stain of tobacco, will not avoid the ballot.

There are fifteen ballots numbered as follows: 45, 49, 50, 78, 68, 73, 74, 53, 27, 72, 59, 75, 40, 36, 66, to which these objections were made, and we think that all of them should be counted for the appellant. But blurred spots, plainly made by a lead pencil, which may have been made for the purpose of canceling a cross, but which might have been made also for identification, or a cross not opposite the name of any candidate, or two or more crosses instead of one, or a number of crosses in a bunch, or a mark not a cross, or the use of a blue lead pencil instead of a black one, or a straight line, thus, —, over the word "No," or writing a word instead of employing a cross, are grounds for rejecting the ballot.

There are seventeen ballots to which these objections apply, and we think the court properly rejected them. These ballots were numbered as follows: 30, 39, 44, 69, 33, 38, 60½, 71, 41, 48, 66½, 37, 52, 35, 54, 57, 77.

The district court found that Hayes was entitled to five hundred and fifty-eight votes, and Coughlin five hundred and sixty-one. Adding to Hayes' vote the fifteen votes that we have found for him changes the result of the election.

Similar motions were made in this case as those in *Lynip v. Buckner*, 22 Nev. 426, and upon the authority of that case the motions are dismissed.

Judgment reversed and cause remanded for a new trial.

Bonnifield, J., concurred.

TWO MOTIONS were dismissed in the principal case upon the authority of *Lynip v. Buckner*, 22 Nev. 426, which was an election contest. The parties had been candidates, at the general election of November, 1894, for the office of district attorney. According to the official returns, Buckner received the highest number of votes, and a certificate of his election was issued. Lynip inaugurated a contest and was declared to be elected. Buckner's motion for a new trial was denied and he appealed. In the supreme court, Lynip moved to dismiss the appeal upon the ground that it was not taken within the time required by the statutes of the state for an appeal to be taken in election contests. This motion was based upon a statute which reads as follows: "Whenever an election shall be annulled and set aside by the judgment of the district court, and no appeal has been taken therefrom within thirty days, such certificate, if any has been issued, shall thereby be rendered void, and the office become

vacant." The judgment was rendered on February 20, 1895, and the motion for a new trial was denied on May 11th, more than thirty days thereafter. In passing upon the motion, the court held that, while Lynip was declared to be elected, the judgment was not one in which an election had been annulled and set aside, but, on the contrary, that the election had been upheld. It was not contended that a vacancy existed, which must necessarily have been the result had the election been annulled. The provisions of the statute above quoted were therefore held inapplicable, and the motion was denied.

The other motion was to strike out all of the record in the case, except the judgment-roll, upon the ground that the district court had no jurisdiction of the case after the entry of judgment. The statute relating to elections conferred original jurisdiction upon district courts in this class of cases, but said nothing, in direct terms, upon the subject of new trials or appeals. "Under these circumstances," said the court, "we must look elsewhere for the mode of procedure. The civil practice act was adopted long before the passage of the act relating to elections. It provides a mode for review upon motion for new trial or appeal in all cases tried by district courts, and in enacting the election law, it was unnecessary to provide for any further mode of procedure than the practice act furnished." The motion to strike was, therefore, denied.

APPEAL.—An objection not made, or a question not raised, in the trial court will not be considered on appeal: *Reich v. Cochran*, 151 N. Y. 122; 56 Am. St. Rep. 607, and note.

ELECTIONS—AUSTRALIAN BALLOT LAW—IDENTIFICATION MARKS.—If an unauthorized mark is inadvertently placed upon a ballot by a voter, and it is not of a character to be used readily for the purpose of identification, the ballot should be counted; but if it is made deliberately and may be used as a means of identifying the ballot, it should be rejected: *Whittam v. Zahorik*, 91 Iowa, 23; 51 Am. St. Rep. 817; *Lankford v. Gebhart*, 130 Mo. 621; 51 Am. St. Rep. 585; monographic note to *Taylor v. Bleakley*, 49 Am. St. Rep. 240-249, on what distinguishing marks will invalidate a ballot under the Australian ballot law.

CASES
IN THE
SUPREME COURT
OF
NORTH CAROLINA.

HINTON v. PRITCHARD.

[120 NORTH CAROLINA, 1.]

TRUST DEED, RIGHT TO CONTROL ORDER OF SALE UNDER.—One who purchased land at a trustee's sale, but subject to another and prior deed of trust, and who subsequently purchased the indebtedness secured by such prior deed and caused the lands conveyed thereby to be advertised for sale thereunder, such deed including two parcels, has no right to have the trustee first sell the lot which had not been sold at the prior sale. The trustee may, in his discretion, first sell the lot which had been sold under the subsequent trust deed, and the person bidding it in obtains a perfect title, irrespective of the smallness of his bid, there being no suggestion of fraud in the transaction.

A TRUSTEE IN A DEED MADE FOR THE PURPOSE OF SECURING INDEBTEDNESS due from the grantor to a third person is the agent both of the debtor and the creditor and required to discharge his duties with strict impartiality, and not for the purpose of oppressing either. If the deed includes two or more parcels of land, the trustee has a discretion to determine which he will first offer for sale, and may therefore determine to first sell a parcel which has already been sold under a subsequent deed of trust.

Action for the recovery of real property. Judgment for the plaintiff; the defendants appealed.

Battle & Mordecai, for the plaintiff.

E. F. Aydlett, for the defendant.

MONTGOMERY, J. The plaintiff purchased the tract of land, which is the subject of this action, at a trustee's sale made under a deed of trust subsequent to and subject to the provisions of a former deed of trust. The debtor was the same in both deeds, and both deeds embraced the tract of land described in the

complaint, and also another parcel of real estate described as the town lot. The plaintiff purchaser was the cestui que trust in the deed under which he bought, and the trustee's deed to him recited that the land sold was subject to the former trust deed. The former trust deed referred to was executed to U. L. Simpson, trustee. After the purchase of the land by the plaintiff, he bought from the holder the note secured in the first deed of trust. Both parcels of land were then advertised regularly and sold by Simpson under the first deed. At the sale, the plaintiff insisted that Simpson should sell the town lot first, and the debtor insisted that the tract which the plaintiff had purchased under the first sale should be sold first. The trustee, Simpson, sold first the tract which the plaintiff had bought at the first sale, and the defendant, J. L. Pritchard, a son of the debtor, became the purchaser at the price of five dollars. There is no allegation of fraud or wrongdoing alleged in the complaint, and no allegation as to the value of the tract of land.

The question then presented is, Did the trustee, Simpson, have the discretion and power to sell first in order the tract of land which he did sell first, against the plaintiff's specific direction that he should sell the town lot first? If the trustee has this power and discretion, it follows that the defendant got a good title to the land, notwithstanding that the purchaser was the son of the debtor and the purchase³ money was only five dollars (no fraud having been alleged in the transaction), and the plaintiff cannot recover. The plaintiff, having bought the tract of land at the first sale under the junior trust deed, got title to the land upon his purchasing the note secured in the first deed of trust. At the sale of the land he acquired, by his deed from the trustee, all the interest of the debtor in the same, subject to the charge upon it of the indebtedness secured in the first deed, and the purchase of that indebtedness was a payment of it if he chose to so regard it. But the plaintiff did not choose to be satisfied with this position. He treated the first deed of trust as still open and in force, and ordered the trustee to proceed under it with a sale of one of the parcels of land conveyed in it. In our opinion, he could not treat the trust as open for the sale of one parcel of the land and closed as to the other. In trust deeds for the benefit of creditors, the trustee is the agent of both creditor and debtor, and he is required to discharge his duties with the strictest impartiality as well as with fidelity, and according to his best ability: *Johnston v. Eason*, 3 Ired. Eq. 330; *Perry on Trusts*, sec. 620. The purposes of the creditor and debtor here, are plainly to be seen in this transaction. The creditor wished

to place the burden of his debt upon the town lot, he having bought the other tract at the first sale but still subject to the first trust deed; and the debtor wished to make him proceed against the tract which he had bought at the first sale, and by that course to save his home. Under this condition of things, the trustee was forced to exercise his discretion, and the law holds him to the exercise of this discretion in a reasonable and intelligent manner. He was bound, in the exercise of his power, to use it neither for the oppression of the debtor nor to sacrifice the estate. We cannot say from the facts in this case that the trustee, Simpson, exercised his power ⁴ unjustly toward the creditor, the plaintiff, or unnecessarily prejudicial to his interests. We can see from the record in the case how the trustee may have impartially, and with the utmost good faith, acted as he did, thinking that the creditor might be unprejudiced in his rights and that the debtor might be enabled to save his home. There is nothing going to show either bad faith or unfair discretion in the action of the trustee. The result is serious to the plaintiff, but a person *sui juris* is allowed to manage his own affairs in his own way, if not contrary to law.

There was error in the ruling of his honor, and judgment should have been rendered for the defendants.

Error.

TRUST DEEDS—SALES UNDER BY TRUSTEES.—It is the duty of a trustee to act impartially between all parties interested in the execution of the trust, and not to needlessly sacrifice those interests: Monographic note to *Tyler v. Herring*, 19 Am. St. Rep. 235. Where premises subject to the lien of a deed in trust executed to secure a debt are conveyed to one who assumes the payment of the debt, and are afterward sold in pursuance of the power contained in the deed of trust, the trustor is fully authorized and competent to bid at the sale, and may, as incident to this right, pay the customary amount of earnest money on the bid, and deduct the sum out of the amount paid by the person to whom he transfers the rights acquired by his bid, and to whom the trustee's deed is finally made: *Bensieck v. Cook*, 110 Mo. 173; 33 Am. St. Rep. 422. See *Paul v. Fulton*, 82 Mo. 110; 82 Am. Dec. 124; *Schanewerk v. Hoberecht*, 117 Mo. 22; 33 Am. St. Rep. 631.

IN RE DAVIS' WILL.

(120 NORTH CAROLINA, 2.)

WILLS, JOINT.—A paper purporting to be the joint will of the two persons executing it as such, and whereby they devise and bequeath property to a third person, cannot, upon the death of one, be proved as the will of both, but may be probated as the will of the decedent.

Application to admit to probate a will purporting to be the will of Sutton Davis and Henrietta, his wife. The clerk of the superior court refused to admit the will to probate, and, on appeal to the trial court the judgment of its clerk was affirmed, and thereupon T. R. Hodges, who was named in the will as executor, appealed.

Charles F. Warren for Thad. R. Hodges, propounder.

No counsel contra.

¹⁰ FAIRCLOTH, C. J. On July 27, 1893, Sutton Davis and wife, Henrietta Davis, jointly executed an instrument of writing, regular in all respects, purporting to be their last will and testament, giving several tracts of land to Fanny Roberson and others and their heirs and assigns. On July 15, 1896, Sutton Davis died. Henrietta is still living.

The executor named in the will offered to prove the paper writing as the joint will of the signers, also to prove it as the separate will of Sutton Davis, and to qualify as executor. The clerk refused the motion, and on appeal his honor affirmed the judgment of the clerk. The executor appealed, assigning as error: 1. The refusal of the court to declare said writing to be the joint will of Davis and wife; 2. The refusal of the court to declare said writing to be the will of the husband alone, and to order the clerk to qualify him as executor thereof.

¹¹ This case is somewhat novel, and presents a question which, so far as we have discovered, has not been brought to the attention of this court except in one case: 1. Can the paper writing be probated as the joint will of the signing parties? 2. If it cannot, may it be proved as the separate will of the deceased husband?

The record fails to disclose whether the property belonged to one or partly to each of the devisors, but we are informed by counsel that some parts of the land belonged to each. We shall assume such to be the fact, as that is the strongest view against the executor. The paper professes in plain language a joint pur-

pose to dispose of the property in a single instrument and to have one executor. There is no intimation of survivorship on the death of one, or when the devise shall become operative, whether upon the death of one as to his or her part, or upon the death of both as to the whole property. The question, then, must be answered upon these plain words, "We give and bequeath to Fanny Roberson, colored, and her daughter Adelia Roberson, and their heirs and assigns, a certain tract or parcel of land bounded and described as follows," etc.

We omit from our consideration the first error assigned, for in no view can the instrument be proved as the will of both, the wife now living. If established in any way, it must be as the separate will of the deceased husband. The text-books to which we were referred on this subject, treat of joint wills, conjoint wills, compacts, and mutual wills, etc., all of which would fall under the first error assigned.

There is nothing from which it can be implied even that there was any agreement that if one should devise to these devisees the other would do so, or that if one should afterward revoke the other would do so. Either had the right to do so, and without notice to the other. It is not like the ¹² case of a mutual will, in which after the husband's death, by which event the wife's estate was much increased, she makes another will and diverts the husband's property from the course intended and agreed upon by them at the execution of the joint will. In such case, the probate court was unable to control and prevent the wrong, but a court of equity takes hold on the ground of preventing a fraud.

So, the rights of parties in a court of probate are essentially different from their rights after probate, which are to be administered in another jurisdiction. Then why may not a husband and wife convey their separate property by will as well as by deed? The irrevocability in the latter case, and the revocability in the former, necessarily so as long as the party lives, can make no difference, because the act must be as valid at the time it is done in the one case as the other. Third parties are interested in contracts (as deeds), whereas no one can acquire any interest in a devise until after the devisors' death. We find nothing in the statute of wills in conflict with this view. If each had made a separate will at the same time, giving the same property to the same devisees, there could be no doubt of the validity of each, with the power to revoke at any time. Can the fact that they did so by one joint act change the character of the transaction? The intent of both is equally manifest, and the intent is the con-

trolling element, both in the execution and construction of wills.

In *Clayton v. Liverman*, 2 Dev. & B. 558, the majority of the court held that a will jointly executed by two sisters could not be probated, either as a joint will or as their separate wills. There, both died within a few days of each other, and the will was not offered for probate until after the death of both. The decision was upon the ground that it was a very singular case, and that such an instrument, as a will, was unknown to the law of this country, and relied ¹³ upon *Hobson v. Blackburn*, 2 Eng. Eccl. Rep. 115. Daniel, J., in his able dissenting opinion, combats the whole argument of the court and insists that the court misapprehended the judge's opinion in *Hobson v. Blackburn*, 2 Eng. Eccl. Rep. 115. On a close reading of the case we think the court did misconceive the question at issue in *Hobson's* case, and we approve the conclusion in the dissenting opinion. As the question was so ably discussed in *Clayton v. Liverman*, 2 Dev. & B. 558, we are not disposed to repeat it, but only give the conclusion.

We find in the books and cases cited below that the current of opinion in the states is contrary to that in *Clayton v. Liverman*, 2 Dev. & B. 558, and we think the reason and common sense of the question are the same way: 1 Schuyler on Wills, sec. 456, note 4, 457, 459; 31 L. J. (1858) 62, 87; 1 Redfield on Wills, 182, 183; *Theobald's Law of Wills*, 12; 1 *Jarman on Wills*, 201, notes 5, 31; *Betts v. Harper*, 39 Ohio St. 639, 641; 48 Am. Rep. 477; *In the Matter of Diez*, 50 N. Y. 94; *Evans v. Smith*, 28 Ga. 98; 73 Am. Dec. 751.

Our conclusion is, that the instrument offered for probate may be proved now as the separate will of Sutton Davis as to his property described therein, and that, unless in some way revoked, it may, upon the death of his wife, be probated as to her property mentioned therein.

Reversed.

WILLS—JOINT—VALIDITY OF.—Upon the subject of the validity and effect of joint wills, there is some difference of opinion among the decided cases: Extended note to *Lewis v. Scofield*, 68 Am. Dec. 407-410. See, also, *Walker v. Walker*, 14 Ohio St. 157; 82 Am. Dec. 474; *Betts v. Harper*, 39 Ohio St. 639; 48 Am. Rep. 477.

ROBBINS v. RASCOE.

[120 NORTH CAROLINA, 79.]

DEED, DELIVERY OF, WHEN COMPLETE AND IRREVOCABLE.—A grantor who signs and seals a conveyance and delivers it to a third person with instructions to have it proved by the subscribing witnesses, before the proper officer, and then to record it, has thereby made a complete and irrevocable delivery, and the instrument remains in force, though, before the grantee knew of its existence, the grantor obtained possession of it, saying that he had changed his mind, and after his death it was destroyed by his executor.

DEED, DELIVERY WITHOUT KNOWLEDGE OF GRANTEE.—When one delivers a deed to a third person in the absence of the grantee, the latter is presumed to accept it, so that it forthwith becomes a deed. This presumption can be rebutted by proving that the grantee refused to accept it.

Action to have the defendants declared trustees and required to convey certain lands to plaintiff for life with remainder in fee to her children. The claim of the plaintiff was based upon a deed which she alleged to have been made to her by Thomas Gilliam, deceased, and subsequently destroyed. Judgment for the plaintiff, and the defendants appealed.

Martin & Peebles, for the plaintiff.

Francis D. Winston, for the defendants.

⁸⁰ **FAIRCLOTH, C. J.** The natural father of the plaintiff executed a deed signed and sealed conveying property to the plaintiff, and "delivered said deed to the deputy clerk of the superior court of Bertie county, with instructions to have the same proved by the subscribing witness before the clerk of said court, who at the time was absent from his office, and to have the same duly registered," and some time thereafter, before any probate was had, without plaintiff's knowledge or consent, the grantor took the deed from the deputy clerk and carried it away from the office, stating that he had changed his mind about the delivery of the same, and after his death his executor destroyed the deed. ⁸¹ Plaintiff knew nothing of the deed or of its recall. The court held that the delivery was complete, and the title passed. Exception and appeal. This is the only question in the case, the defendant denying that there had been a delivery.

Upon principle and the authorities, we must affirm the judgment. The principle is, that when the maker of a deed delivers it to some third party for the grantee, parting with the possession of it, without any condition or any direction to hold it for him, and without in some way reserving the right to repossess

it, the delivery is complete, and the title passes at once, although the grantee may be ignorant of the facts, and no subsequent act of the grantor or anyone else can defeat the effect of such delivery.

In *Threadgill v. Jennings*, 3 Dev. 384, it is stated that "a deed is good if delivered to a stranger to the use of the obligee" and "at the time it was thus delivered."

In *Tate v. Tate*, 1 Dev. & B. Eq. 26, David Tate executed a deed of bargain and sale conveying land to his infant children, and delivered the deed to their uncle, Hugh Tate, in whose possession it remained until his death, when the bargainor went to the widow of Hugh Tate and obtained the deed before it was registered, and canceled it by tearing off his signature, and that of the witness, and he, David Tate, conveyed the same property to another. The delivery of the deed was upheld, the court saying, "Where the maker of a deed parts from the possession of it to anybody, there is a presumption that it was delivered as a deed for the benefit of the grantee, and it is for the maker to show that it was on condition, as an escrow. Such a delivery to a third person is good, and the deed presently operates, and infants may assent to such a deed to themselves, and their assent is presumed until the contrary appears": Citing several English cases.

⁸² In *Kirk v. Turner*, 1 Dev. Eq. 14, Henderson J. says: "A delivery of a deed is, in fact, its tradition from the maker to the person to whom it is made, or to some person for his use; . . . for his acceptance is presumed until the contrary is shown. It being for his interest, the presumption is, not that he will accept, but that he does."

In *Morrow v. Alexander*, 2 Ired. 388, a father residing in South Carolina signed and sealed a deed to his daughter residing in North Carolina, and delivered it in South Carolina to his son to be given to his daughter; held by this court that the delivery to his son was complete, and the title passed: *Gaskill v. King*, 12 Ired. 211, sustains and cites *Tate v. Tate*, 1 Dev. & B. Eq. 22.

In *McLean v. Nelson*, 1 Jones, 396, the court says: "When one delivers a deed to a third person in the absence of the grantee, the latter is presumed to accept it, so that it forthwith becomes a deed, and the legal effect is to pass the property. This presumption may, of course, be rebutted by proving that the party refused to accept it; but until he refuses, his assent is presumed for the purpose of giving effect to the instrument as a deed. *Ut res magis valeat quam pereat.*"

In *Phillips v. Houston*, 5 Jones, 302, the donor signed and sealed the deed and delivered it to Holland, the witness, "and requested him to take it to the courthouse and have it recorded," which was not done until after the donor's death; it was held that the delivery to the first person (Holland), was perfect, and it made no difference whether it was registered before or after the donor's death, the court saying: "In the case of *Hall v. Harris*, 5 Ired. Eq. 303, it was said by the court that the delivery of a deed depends upon the fact that a paper signed and sealed is put out of the possession of the maker. That, we think, is the true test, and if it appear that the grantor or donor has⁸³ parted with the possession of the instrument to the grantee or donee, or to any other person for him, the delivery is complete, and the title of the property granted or given thereby passes. But it will be otherwise if the grantor or donor retains any control over the deed; as if he, when he hands it to a third person, requests him to keep it and deliver it to the person for whom it is intended, unless he shall call for it again. These principles will be found to govern all the cases, beginning with *Tate v. Tate*, 1 Dev. & B. Eq. 22"—and then a large number of North Carolina cases are cited.

This principle has governed this court to the present time: *Helms v. Austin*, 116 N. C. 751; *Frank v. Heiner*, 117 N. C. 79.

The case of *Adams v. Adams*, 21 Wall. 185, is well argued by the court, and the same conclusion arrived at. It is there stated upon the ancient authorities that if A execute a deed to B and deliver it to C, though he does not say to the use of B, yet it is a good delivery to B if he accepts of it, and it shall be intended that C took the deed for him as his servant—that it is conclusive unless there be clear and decisive proof that he never parted, nor intended to part, with the possession of the deed. There are some decisions in the states holding otherwise, but they are not in harmony with the higher and better authorities. *Parmelee v. Simpson*, 5 Wall. 81, was a controversy between a grantee and mortgagee, and was decided in conformity to the laws of Nebraska. *Hawkes v. Pike*, 105 Mass. 560, 7 Am. Rep. 554, is a decision to the contrary, but the annotator of 4 Kent's Commentaries calls attention to this case as out of line with the better decisions.

In *Hedge v. Drew*, 12 Pick. 141, 22 Am. Dec. 416, the grantor left the deed with the register to be recorded, his daughter being the grantee. The deed was dated October 2, 1823,⁸⁴ and was recorded October 3, 1823. An attachment was levied on the same

property on October 4, 1823. The court held unanimously that the delivery was equivalent to an actual delivery to the grantee personally.

In the case before us, that the grantor intended a delivery and that the title should pass at the time he put the deed in the hands of the deputy clerk, with instructions to have it probated and registered, is manifest from his statement, when he took the deed from the deputy clerk, saying, "that he had changed his mind about the delivery of the same, owing to some conduct of the plaintiff that displeased him."

Affirmed.

JUDGE CLARK dissented. He insisted that the leaving of the deed by the grantor with the deputy clerk to have it proved and then recorded was not an absolute delivery, because the existence of the deed was not known to the grantee. Upon the proposition that the delivery of a deed to the register for the purpose of recordation was not a delivery, if the grantee was ignorant of the existence of the deed, he cited *Derry Bank v. Webster*, 44 N. H. 264; *Barns v. Hatch*, 3 N. H. 304; 14 Am. Dec. 369; *Maynard v. Maynard*, 10 Mass. 456; 6 Am. Dec. 146; *Samson v. Thornton*, 3 Met. 281; 37 Am. Dec. 135; *Oxnard v. Blake*, 45 Me. 602; *Jackson v. Phipps*, 12 Johns. 418; *Jackson v. Dunlap*, 1 Johns. Cas. 114; 1 Am. Dec. 100; *Jackson v. Richards*, 6 Cow. 618; and while registration raises a presumption of acceptance, and the subsequent acceptance of a deed registered without the knowledge of the grantee is sufficient (*Thayer v. Stark*, 6 Cush. 11), this was not true, if, in the mean time, the rights of third persons had accrued (*Harrison v. Phillips Academy*, 12 Mass. 461; *Jackson v. Rowland*, 6 Wend. 666; 22 Am. Dec. 557), and that assent by the grantee must be made before the grantor revokes his intention to convey: *Canning v. Pinkham*, 1 N. H. 357; *Hawkes v. Pike*, 105 Mass. 561; 7 Am. Rep. 554. The judge insisted that, under the circumstances of the case, the deed could not be regarded as delivered to the deputy clerk to hold for the grantee, but that, on the contrary, such deputy was the agent of the grantor and not of the grantee, and therefore that at no time was the deed in the hands of anyone for the use of the grantee.

DEEDS—DELIVERY—WHAT IS SUFFICIENT—KNOWLEDGE OF GRANTEE.—It is not essential to the validity of a deed that it should be delivered to the grantee personally. If the grantor, without reserving any control over the instrument, delivers it to a third person unconditionally for the use of the grantee and with the intent that it shall take effect immediately, such delivery is sufficient, and the title to the property passes to the grantee, and cannot be divested by the subsequent loss or destruction of the deed: *Brown v. Westerfield*, 47 Neb. 399; 53 Am. St. Rep. 532, and monographic note on what is a delivery of a deed.

WILSON v. LEARY.

[120 NORTH CAROLINA, 90.]

EJECTMENT, DEFECTS IN DEFENDANTS' TITLE.—A plaintiff suing to recover real property must show title in himself, and, failing to do so, is not aided by defects in the defendants' title.

TRUST, WHEN VESTS TITLE IN BENEFICIARIES.—A grant to trustees in fee simple for the use or benefit of persons named therein vests the fee in such beneficiaries.

CORPORATIONS, DISSOLUTION OF, PROPERTY OF, TITLE DOES NOT RETURN TO GRANTOR.—If a corporation ceases to exist, real property conveyed to it does not return to the grantor nor to his heirs. This remains true, though at the execution of the conveyance, the time during which the corporation could continue was fixed by law, and such time has expired.

Action by the heirs at law of Henderson Wilson to recover certain real property. He, on the 5th of July, 1849, conveyed the property in controversy to trustees for Oriental Lodge, No. 24, Independent Order of Odd Fellows. The lodge went at once into possession of the property, and it was afterward incorporated under an act of the legislature of the state of North Carolina, passed in 1850. The lodge ceased to exist in 1872, and a year later the grand lodge ordered the property to be sold, and it was purchased by and conveyed to the defendants. The claim of the plaintiffs was, that when the corporation ceased to exist, the land reverted to them as heirs of the grantor, Henderson Wilson.

Battle & Mordecai, for the plaintiff.

Francis D. Winston and Shepherd & Busbee, for the defendants.

⁹¹ CLARK, J. The plaintiffs must recover upon the strength of their own title, and not upon defects, if any, in the title of the defendants. The conveyance by their ancestor, Henderson Wilson, was in fee simple to trustees "to convey to Oriental Lodge, No. 24, I. O. O. F., when the same shall have been incorporated by the legislature of North Carolina." It was subsequently incorporated. Though no conveyance by such trustees to the lodge is shown, the learned counsel for the plaintiffs admitted that the statute of uses, 27 Henry VIII, in force in this state by virtue of our statute, executed the use without the execution of a deed. The grant to the trustees being in fee simple, the cestui que trust took in fee: *Holmes v. Holmes*, 86 N. C. 205. When the lodge ceased to exist for want of members, whether its property passed to the Grand Lodge of I. O. O. F.

in this state, of which Oriental Lodge, No. 24, was a member, or escheated to the state for the University (Code, sec. 2627), does not concern the plaintiffs, and is not before us. The title in fee simple had passed out of the grantor, and having vested in the Oriental Lodge, upon the extinction of the latter as a corporate entity, its property, by no just construction, could return to those whose ancestors had conveyed it in fee upon receipt of the purchase money, which he and they have kept and enjoyed.

The plaintiffs' counsel insist, however, that at the time of the conveyance, the Revised Statutes, chapter 26, section 17, provided that a corporation, unless otherwise specially stated in its charter, had existence for only thirty years, and as there was no special provision in this charter, the grantor only parted with the property for thirty years and held a resulting ⁹² trust. But the conveyance was in fee, and a corporation limited in duration can take a fee simple conveyance just as a natural being, whose existence is also limited. Either may convey away the property, and upon the death of either, without having disposed of it, the property will go to pay creditors, to heirs, to stockholders, or as an escheat, according to the circumstances, but in neither case is there any reverter to the grantors. On the death of a corporation, the property is usually administered by a receiver, and on the death of a natural person, by the personal representative or passes to the heirs.

By the constitution of North Carolina, article 8, section 1, all corporations (if chartered since 1868) are subject to extinction at any time, or their duration can be abridged or extended, at the will of the legislature. It would now be a startling doctrine that upon the repeal of a charter, all real estate, though conveyed to the corporation absolutely in fee simple, reverts as at common law to the original grantors, to the total exclusion and loss of creditors and stockholders. On the contrary, such property, when not held on a base or qualified fee, as was the case in *State v. Rives*, 5 Ired. 297 (though it has been since held that there are no qualified fees in this state—*School Com. v. Kesler*, 67 N. C. 443), would be administered to pay creditors, the surplus being divided among the stockholders. If there were no stockholders, then the question might arise whether the property had escheated to the state, but certainly the grantors, upon such corporation becoming extinct, would have no greater right to a reversion than would the grantors to any other corporation. There was no attempt to make avail of the three years and a receiver allowed by the code, sections 667, 668, to wind up a corporation and sell its property, and hence no question is raised

whether they apply to a corporation which was chartered before they were enacted.

⁹³ It is true, it was held in an opinion by Gaston, J. (*Fox v. Horah*, 1 Ired. Eq. 358, 36 Am. Dec. 48), that by the common law, upon the dissolution of a corporation by the expiration of its charter or otherwise, its real property reverted to the grantor, its personal property escheated to the state, and its choses in action became extinct, and hence that, on the expiration of the charter of a bank, a court of equity would enjoin the collection of notes made payable to the bank or its cashier, the debtor being absolved by the dissolution. Judge Thompson (5 Thompson on Corporations, sec. 6720) refers to this decision "in accordance with the barbarous rule of the common law" as "probably the last case of its kind," and notes that it has since been in effect overruled in *Von Glahn v. De Rossett*, 81 N. C. 467, and it is now expressly overruled by us. Chancellor Kent (2 Kent's Commentaries, 307, note) says "this rule of the common law has, in fact, become obsolete and odious," and elsewhere he stoutly denied that it had ever been the rule of the common law, except as to a restricted class of corporations: 5 Thompson on Corporations, sec. 6730. The subject is thoroughly discussed by Gray on Perpetuities, sections 44-51, and he demonstrates that my Lord Coke's doctrine rested on the dictum of a fifteenth century judge (Mr. Justice Choke, in *Prior of Spalding's Case*, 7 Edward IV, 1467), and is contrary to the only case deciding the point—*Johnson v. Norway*, Winch. 37 (1622)—though Coke's statement has often been referred to as law. But whatever the extent of this rule at the common law, if it was the rule at all, it was not founded upon justice and reason, nor could it be approved by experience, and has been repudiated by modern courts. The modern doctrine is, as held by us, that "upon a dissolution the title to real property does not revert to the original grantors or their heirs, and the personal property does not revert to the original grantors or their heirs, and the personal property ⁹⁴ does not escheat to the state": 5 Thompson on Corporations, sec. 6746; *Owen v. Smith*, 31 Barb. 641; *Towar v. Hale*, 46 Barb. 361. The crude conceptions of corporations naturally entertained, in a feudal and semi-barbarous age, when they were few in number and insignificant in value and functions, by even so able a man as Sir Edward Coke, and the fanciful reason given by him (Coke on Littleton, 136) for the reverter of their real estate, to wit, that a conveyance to them must necessarily be a qualified or base fee, have long since become outworn and discredited. That which is termed "the common law" is simply the "right reason of the

thing" in matters as to which there is no statutory enactment. When it is misconceived and wrongly declared, the common rule is equally subject to be overruled, whether it is an ancient or a recent decision. Upon the facts agreed judgment should be entered below against the plaintiffs, dismissing their action.

Reversed.

EJECTMENT.—**PLAINTIFF IN EJECTMENT** must recover upon the strength of his own title, and not upon the weakness of his adversary's: *Cox v. Arnold*, 129 Mo. 337; 50 Am. St. Rep. 450, and note.

TRUSTS—**WHEN TITLE VESTS IN BENEFICIARY.**—A beneficiary is entitled to a decree terminating a trust, where he has the entire beneficial interest both in the income of the property and in the property itself held in trust for his benefit, and there is no limitation over of the estate in any contingency to any other person, nor any provision that the income or estate shall not be alienable by the beneficiary or attachable by his creditors: *Sears v. Choate*, 146 Mass. 395; 4 Am. St. Rep. 320, and note. See extended note to *Kay v. Scates*, 78 Am. Dec. 406-410, and *Battle v. Petway*, 5 Ired. 576; 44 Am. Dec. 59.

CORPORATIONS—**DISSOLUTION**—**EFFECT UPON PROPERTY.**—Dissolution of a corporation does not take away or destroy its property or annul its contracts: *People v. O'Brien*, 111 N. Y. 1: 7 Am. St. Rep. 684. Where lands are conveyed to a corporation by an absolute grant, it would seem that in this country there can remain in the grantor no reversion or possibility of a reverter: Monographic note to *People v. O'Brien*, 7 Am. St. Rep. 720, on the effect of dissolution of a corporation. See, also, *Havemeyer v. Superior Court*, 84 Cal. 327; 18 Am. St. Rep. 192, and note.

HARRISON v. HARGROVE.

[120 NORTH CAROLINA, 96.]

JUDGMENTS, VACATING FOR WANT OF JURISDICTION, WHEN DOES NOT AFFECT PURCHASERS.—An order vacating an order of sale of real property on the ground that no service of summons had been made on the defendants, but declaring that "all orders made in the proceedings be allowed to remain on the records for the purpose of protecting purchasers and others, so far as in law they afford protection," does not deprive purchasers under the order so vacated of its protection, unless they are shown to have had notice of such want of service of process.

JURISDICTION.—A RECITAL IN A JUDGMENT of the service of process imports absolute verity, and must be so treated for all proper purposes until in some proper way the action of the court shall be successfully impeached.

THE VACATING OF A JUDGMENT ON MOTION on the ground that the summons was not served on the defendants does not prejudicially affect persons previously purchasing under such judgment and without notice of the absence of the service of process, where the want of jurisdiction was not disclosed by the record.

Action to recover real property. Judgment for the defendant. Plaintiff appealed.

J. B. Batchelor, for the plaintiffs.

M. V. Lanier, T. T. Hicks, and R. O. Burton, for the defendants.

⁹⁷ MONTGOMERY, J. Lunsford A. Paschal, administrator de bonis non with the will annexed of Robert Harrison, filed a petition against the widow of the testator and his children, heirs at law, among whom were the plaintiffs in this action, for the purpose of obtaining a decree of sale of the tract of land which is the subject of this action, to make assets for the payment of the debts of the decedent. The decree of sale was made on the 3d of December, 1870, by the clerk of the court, and in the decree there was a recital, in substance, that personal service of the summons had been made upon defendants in the following words: "That the nonresident defendant, George Harrison, has been duly notified by publication to appear and answer, etc., and that the resident defendants have been duly served with process summoning them to appear and answer." The pleadings show that George Harrison, one of the children and heirs at law of the testator and one of the defendants in the above-mentioned special proceedings, was a nonresident of the state of North Carolina at the time of filing the petition, and that the other defendants in that proceeding, including the plaintiffs in this action, were residents of the state. The defendant's testator and deviser was the purchaser of the land at the sale by Pascal, the administrator of Robert Harrison. A report of the sale was made and in due time confirmed. The proceedings, ⁹⁸ from the decree of sale to the final decree confirming the sale and ordering the title to be made to the purchaser inclusive, were regular in all respects.

The plaintiffs in 1887, after the death of their mother, instituted this action to recover possession of the tract of land, claiming the same as devisees under the will of their father, Robert Harrison.

At the time of the commencement of this action, the defendant, testator and deviser, T. L. Hargrove, was living, and in his answer to the complaint of the plaintiffs set up as a defense the deed of the administrator, Pascal, to him, and the decree of the court ordering the sale, and which recited that personal service of the summons had been made on the defendants in the special proceeding, among whom the plaintiffs in this action were included, and also the decree confirming the sale. The plaintiffs, finding these decrees in the special proceeding in their way, and apprehending that they could not proceed with the action as

long as those decrees should remain in existence, made a motion in the special proceeding, under which the land was sold, to set aside and vacate the order of sale on the ground that no service of summons had ever been made upon them in that proceeding, and that they had made no appearance in said proceeding, or had any notice thereof. The clerk heard this motion and from his ruling there was an appeal, which was heard by Judge Graves, who, after finding the facts, rendered judgment in the following words: "It is considered by the court as a matter of legal inference, that the purchasers at the administrator's sale had notice of the order of the sale and of the want of proper advertising of sale. Therefore, it is considered and adjudged by the court that the said order of sale, made on the 3d of December, 1870, was irregular and not according to the course of the court as to the persons named as defendants, to wit, Rebecca ^{vs} Harrison, Judith W. Harrison, Nancy Dement, formerly Nancy Harrison, and Mary Harrison, and is void as to them; and that the same be canceled and vacated as to them by this order, and that all the orders heretofore made in this action shall be allowed to remain upon the records for the purpose of protecting purchasers and others so far as in law they afford protection. It is further considered that the movers recover their costs." From this judgment the defendants appealed to the supreme court.

The appeal was heard at the February term, 1890, and is reported in *Harrison v. Harrison*, 106 N. C. 282. In that appeal it does not appear that the question whether or not the decree of sale made in the special proceeding protected the defendant in his purchase, notwithstanding it was shown before Judge Graves, when he vacated the judgment, that in point of fact there had been no personal service of summons on the defendants and that they had not appeared therein, was discussed. Whether Judge Graves' judgment, based upon the fact found by him that there had been no personal service of the summons in the special proceeding upon the defendants, and that they had made no appearance therein, could have had the effect of divesting the defendant of his rights acquired at his purchase at the administrator's sale, was not passed upon. Indeed, it seems upon reading the opinion that the point was not noticed. In the summary of facts made by the court, it is not stated that the decree ordering the sale of the land recited service of the summons upon the defendants. The judgment of Judge Graves, however, was affirmed by this court. After the judgment of Judge Graves had been passed upon, this action was brought to trial and judgment was had for the plaintiffs. Upon appeal to this court by the de-

fendants, reported in *Harrison v. Hargrove*, 109 N. C. 346, the matter was disposed of on the sole ground of laches in the plaintiffs in bringing their action—¹⁰⁰ seventeen years having elapsed between the order of sale in the special proceeding and the commencement of this action, and a new trial was granted.

The action then came on for trial before Judge Coble, from whose ruling and judgment the present appeal comes. His honor charged the jury in substance that the purchaser at the administrator's sale (the defendant's testator and deviser) was protected by the decree under which the land was sold—the decree having recited that personal service of the summons had been made upon the defendants in the special proceeding for the sale of the land, and that the administrator, in his deed, conveyed to the purchaser a good title to the land, and that there was no evidence before the court that the purchaser had notice at the time of the purchase and confirmation of the sale that the defendants had not been served with summons. The language of his honor is as follows: "But the court instructs the jury that the decree under which the deed to T. L. Hargrove was made cannot be treated as having been set aside so as to affect the right of the defendants who claim under T. L. Hargrove, deceased, who purchased at the sale, unless at the time he purchased and took his deed he had notice in point of fact that the plaintiffs in this action, who were defendants in the proceeding in which the order of sale was made, had not been served with process; and there is no evidence that said Hargrove had such notice. Wherefore the court instructs the jury that the deed from Paschal, administrator of Harrison, passed to T. L. Hargrove whatever title said Harrison had in the land in controversy, and if the jury believe the evidence, the plaintiffs are not entitled to recover, and the jury are instructed that if they believe the evidence they will answer the first, second, and third issues, No."

That instruction and the exception to it by the defendants present the only point necessary to be discussed and ¹⁰¹ decided in this case. On the latter section of this instruction it can be said, once for all, that there was no error in his honor's instruction. In Judge Graves' findings of fact, when he vacated the decree of sale in the special proceeding, he did not find that the purchaser, Hargrove, had notice that the summons had not been served upon the defendants. He found, as a fact, that the summons had not been served upon the defendants, but he did not find that the purchaser had notice of this failure of service of the summons; and there is not a word of testimony appearing anywhere that the purchaser had any such notice. It is con-

tended for the plaintiffs that the judgment of Judge Graves vacating the decree for the sale of the land made in the special proceeding is absolute in its meaning, and that the apparently restrictive words at the end of the judgment, to wit, "and that all the orders heretofore made in this action shall be allowed to remain upon the record for the purpose of protecting purchasers and others so far as in law they afford protection," refer only to the purchaser's right of George Harrison's interest (he being a nonresident defendant and served with summons by publication in the special proceeding), and not to the interest of the defendant Hargrove in his purchase of the interest of the other defendants; and, that as a legal consequence, the deed of the administrator, Paschal, to Hargrove, the purchaser, passed no title. If it be conceded that the judgment of Judge Graves does have the effect to vacate and reverse, unqualifiedly, the decree of sale, then, we are face to face with the question, Is the defendant, whose testator and deviser was the purchaser under the decree of sale, protected under the decree which recited that personal service of the summons had been made upon the defendants in the rights acquired by the purchaser under that decree, and under the deed made to him by virtue of that decree, ¹⁰² notwithstanding it has been since made to appear that personal service of summons of the defendant was in point of fact not made? The judgment of Judge Graves was based, as we have said, on the ground that the defendants in the special proceeding for the sale of the land (the plaintiffs here) had not been served with summons, nor had they made any appearance therein. This matter we will now discuss.

The court (probate court) at the time the petition for the sale of the land was filed by the administrator, Paschal, and when the decrees were made (1870) had jurisdiction of the subject matter and of the persons interested in the land. The decree of sale, upon its face, was perfectly regular in all respects, and recited the fact that the summons had been served on the defendants. It cannot be insisted that this decree was a void or irregular judgment. It was perfectly regular on its face. In *Doyle v. Brown*, 72 N. C. 393, the court declared that "where a defendant has never been served with process, nor appeared in person or by attorney, a judgment against him is not simply voidable, but void; and it may be so treated whenever and wherever offered, without any direct proceeding to vacate it. And the reason is, that the want of service of process and the want of appearance is shown by the record itself whenever it is offered. It would be otherwise if the record showed service of process or

appearance, when in fact there had been none. In such case, the judgment would be apparently regular and would be conclusive, until by a direct proceeding for the purpose it would be vacated." In *Sumner v. Sessions*, 94 N. C. 371, the same point is decided in the same way, and the ruling in *Doyle v. Brown*, 72 N. C. 393, is cited and approved. In *Brickhouse v. Sutton*, 99 N. C. 103, 6 Am. St. Rep. 497, the appeal coming up upon the very point raised in this case, where the superior court in a decree of dower ¹⁰³ recited the fact that the defendant had been served with process and copies of the petition, this court held that "the ascertainment and recital of facts in the record by the court imports verity and binding effect, and must be so treated for all proper purposes of the action until in some proper way the action of the court shall be successfully impeached. Thus, in this case it must be taken that the court, acting upon proper evidence, ascertained and set forth in the record the important fact that the defendants in the proceeding in question were served with the process against them, that is, served regularly, effectually."

The counsel of the plaintiffs, no doubt being aware of these decisions, acted under them, and, as we have said, moved in the original special proceeding to vacate and set aside the decree of sale of the land. In the argument before this court, however, they insisted on both views—that the judgment was void, as well as voidable. We have seen that the decree of sale was valid and conclusive until the impeaching order of Judge Graves was made. Now, if we treat the Graves judgment as unqualifiedly adjudging the decree of sale void and set aside, what effect will this court give to that judgment in so far as the rights of the purchaser, at the sale of the land under the decree in the special proceeding, are concerned? We think that the decisions of our court settle the question, and that they are in favor of the defendant.

In *Chambers v. Brigman*, 75 N. C. 487, the purchaser of real estate, at a commissioner's sale appointed by the court, bought with a knowledge of the fact that the defendant was not served with summons or had notice of the action. This court held that the defendant was not bound by the decree of sale. The court in that case said that "no one can contend that a plaintiff can take any benefit by a purchase which is made under a decree in an action to ¹⁰⁴ which he knows that the person, against whom it was made, and who was in possession of the land claiming it as his own, was not truly a party. Had any other than the plaintiff been the purchaser, the case might have presented more

difficulty." The case before us presents whatever of difficulty there might be in the suggestion of the court in that case. The purchaser here was no party to the special proceeding; he was an outsider and bought under a decree which recited that the summons had been served upon the defendants.

In *Sutton v. Schonwald*, 86 N. C. 198, 41 Am. Rep. 455, this court held in a case where title had been acquired at a judicial sale of land made by decree of a court of competent jurisdiction, and where the party who was owner of the land was not in point of fact a party to the action, but who of record appeared to be a party, that the purchaser was protected and that the deed from the commissioner passed the title to the property. The court said: "In such cases, the law proceeds upon the ground as well of public policy as upon principles of equity. Purchasers should be able to rely upon the judgments and decrees of the courts of the country, and though they may know of their liability to be reversed, yet they have a right so long as they stand to presume that they have been rightly and regularly rendered, and they are not expected to take notice of the errors of the court or the laches of parties. A contrary doctrine would be fatal to judicial sales, and values of title derived under them, as no one would buy at prices at all approximating the true value of property, if he supposed that his title might at some distant day be declared void, because of some irregularity in the proceeding, altogether unsuspected by him and of which he had no opportunity to inform himself. Under the operation of this rule, occasional instances of hardship (as this one of the present plaintiffs ¹⁰⁵ seems to be) may occur, but a different one would much more certainly result in mischievous consequences, and the general sacrifice of property sold by order of the court. Hence, it is, that a purchaser who is no party to the proceeding is not bound to look beyond the decree, if the facts necessary to give the court jurisdiction appear on the face of the proceedings. If the jurisdiction has been improvidently exercised, it is not to be corrected at his expense, who had a right to rely upon the order of the court as an authority emanating from a competent source—so much being due to the sanctity of judicial proceedings."

In *Morris v. Gentry*, 89 N. C. 248, this court said that "it is likewise well settled that courts will protect third persons who honestly do acts and acquire rights under their judgments, although such judgments may afterward be reversed. All that such persons need be careful to see is, that the court had juris-

diction of the parties and the subject matter, and that the order or judgment, upon the faith of which such acts were done or rights acquired, authorized the same to be done or acquired."

In *England v. Garner*, 90 N. C. 197, the court said: "It is well settled upon principle and authority that where it appears by the record that the court had jurisdiction of the parties and the subject matter of an action, the judgment therein is valid, however irregular it may be, until it shall be reversed by competent authority; and although it be reversed, the purchaser of real estate or other property at a sale made under and in pursuance of such judgment, while it was in force and while it authorized the sale, will be protected." Of course, we are not inadvertent to the provision of our state constitution which declares "that no man shall be disseised of his freehold or deprived of his life, liberty, or property except by the law of the land," and to that provision of the constitution of the United States ¹⁰⁶ which provides, in like terms, "nor shall any state deprive any person of life, liberty, or property without due process of law." This opinion is not at variance, we trust, with the great principle declared in those instruments. We are simply announcing law that is of ancient authority, as well as of recent affirmance, that where a court of competent jurisdiction of the subject matter recites in its judgment a decree that service of process by summons, or in the nature of summons, has been made upon the defendants who are subject to the jurisdiction of the court, and the judgment is regular on its face, a purchaser of property under such a judgment or decree must be protected in his purchase, even though the judgment or decree be afterward set aside on the ground that in point of fact service of summons had not been made; that such a decree of such a court is the best and highest declaration that the constitutional provisions which require that a person should be heard before he is condemned, and that judgment has been rendered only after trial, have been complied with; and that so far as a purchaser under such a decree is concerned, the judgment is conclusive against all persons.

This conclusion renders it unnecessary to pass upon the other exceptions in the case. There was no error in the ruling and judgment of the court below, and the same is affirmed.

JUDGMENT — PRESUMPTION AS TO JURISDICTIONAL FACTS.—The entire record of a court imports absolute verity: *Goodwin v. Sims*, 86 Ala. 102; 11 Am. St. Rep. 21, and note. A judgment conclusively establishes the existence of jurisdictional facts recited by it so far as collateral proceedings are concerned; and no

evidence dehors the record can be received to impeach them: *Ex parte Ah Men*, 77 Cal. 198; 11 Am. St. Rep. 263. It is presumed in favor of the jurisdiction of the court and in support of the judgment that service of process was duly made, although no evidence thereof appears from the record: *Eichhoff v. Eichhoff*, 107 Cal. 42; 48 Am. St. Rep. 110.

JUDGMENT AUTHORIZING SALE OF LAND—REVERSAL OF—RIGHTS OF BONA FIDE PURCHASERS.—The title of an innocent purchaser of land under a judicial decree is not affected by the subsequent reversal of the decree for irregularity: *Sutton v. Schonwald*, 86 N. C. 198; 41 Am. Rep. 455. See *Gould v. Sternberg*, 128 Ill. 510; 15 Am. St. Rep. 138, and note; *Hudepohl v. Liberty Hill Water etc. Co.*, 94 Cal. 588; 28 Am. St. Rep. 149, and note. Reversals do not affect the rights of bona fide purchasers under decrees and judgments, when such rights were acquired before proceedings to reverse were instituted: *McCormick v. McClure*, 6 Blackf. 486; 39 Am. Dec. 441.

HUSSEY v. HILL.

[120 NORTH CAROLINA, 812.]

MORTGAGE, ASSIGNMENT OF—POWER OF SALE.—The assignment of a note and mortgage does not vest the assignee with the power of sale conferred in the mortgage on the mortgagee, nor does it vest the assignee with the legal title conveyed to the mortgagee by the mortgage.

MORTGAGE, ASSIGNMENT TO MORTGAGOR.—If a mortgagor purchases his own note, which is secured by a mortgage, the transaction does not operate as an assignment, but as a satisfaction, and leaves the land subject to a second mortgage, if there is one.

ESTOPPEL.—IF THE HOLDER OF THE FIRST AND SECOND MORTGAGES on real property sells to the mortgagor the note secured by the first mortgage, he is not thereby estopped from insisting that such sale operates as a satisfaction of the first mortgage, and leaves the property subject to the second only.

The plaintiff was at one time the owner of two mortgages upon the property, the first of which had been executed to him directly, and the second, a junior mortgage, had been assigned to him by one Stanford, the mortgagee. While plaintiff was the owner of these two mortgages, both of which had been executed by the defendant, Friday Hill. He sold and assigned the note and prior mortgage to W. L. Hill. The mortgage so assigned contained a power of sale, and, claiming to act under it, the assignee Hill sold the mortgaged premises to J. S. Wilson, to whom W. L. Hill executed a conveyance pursuant to the sale. Wilson afterward conveyed the premises, with covenants of warranty, to the defendant, Friday Hill. It was claimed that the plaintiff was estopped in this suit against selling his second mortgage by reason of the equitable assignment of the first mortgage to W. L. Hill and Hill's sale thereunder, and that if this were not so, the

defendant, Friday Hill, had become the assignee of the original mortgage. A decree was entered in favor of the plaintiff in the trial court. Upon the first hearing of the present appeal, the court was of the opinion that the record was not such as to present the questions relied upon by the appellants, but it subsequently granted a rehearing.

H. L. Stevens and Jones & Boykin, for the petitioners.

Allen & Dortch and Simmons & Ward, contra.

314 FURCHES, J. In 1883 the defendant, Hill, executed his note and mortgage to the plaintiff, Hussey, and in 1884 he executed a note and second mortgage on the same land to the plaintiff, Stanford. After this, and while the plaintiff, Hussey, was the holder and owner of the first note and **315** mortgage, the plaintiff, Stanford, sold and assigned his note and mortgage to the plaintiff, Hussey. That after the plaintiff, Hussey, had become the assignee of the Stanford note and mortgage, he sold and assigned the note and mortgage given to him in 1883, to one W. L. Hill. That said Hill, the assignee of the plaintiff, Hussey, under the power of sale contained in the mortgage which he supposed authorized him to do so, sold the mortgaged land to the highest bidder, having first advertised the same for the length of time prescribed in the mortgage, when one J. S. Wilson became the purchaser—paid the purchase money and took a deed from said Hill. That after Wilson's occupying the land for about one year, he sold the same to the defendant, Friday Hill, the mortgagor, and made him a deed in fee with warranty.

This presents the case on appeal, and, when it was before us at the last term of this court, we were of the opinion that the question of defendant's title, derived from Wilson, was not presented, and the case went off on a question of pleadings, in which this question was not considered.

But since the opinion in this case was filed, the opinion of the court in *Wagon Co. v. Byrd*, 119 N. C. 460, has been filed, and although the opinion in *Wagon Co. v. Byrd*, 119 N. C. 460, does not in express terms overrule the opinion filed in this case at the last term, it reverses the principle upon which this case was decided, and, in effect, does overrule the opinion in this case. And for this reason the rehearing was granted the defendant, and we come now to consider the case on its merits.

The first ground assigned in the petition is not tenable and is not true in fact. The second, third, and fourth assignments appear to be substantially the same, and state the grounds upon

which the rehearing was granted. But it is not necessary to consider these assignments specifically, as the ³¹⁶ merits of the case were not passed upon in the former opinion, and we treat the case de novo.

The note to the plaintiff, Hussey, was the evidence of the debt from defendant to him, and the mortgage was security for its payment. It was the same as to the note and mortgage from defendant, Hill, to the plaintiff, Stanford.

A mortgagee is the legal owner of the property which he holds in trust for the payment of the debt, and then for the mortgagor: *Parker v. Beasley*, 116 N. C. 1; *Machine Co. v. Boggan* (N. C. Feb. 1897). And the power of sale contained in the mortgage authorized Hussey to foreclose by sale and to convey the legal and equitable title to the purchaser.

But when he sold the note to W. L. Hill and assigned the note and mortgage to him, the latter only became the equitable owner—the naked legal estate still remaining in the plaintiff, Hussey.

This assignment to W. L. Hill did not carry with it the power of sale, and he, only having the equitable estate in the land, could not convey the legal estate: 2 *Jones on Mortgages*, sec. 1992; *Williams v. Teachey*, 85 N. C. 402; *Dameron v. Eskridge*, 104 N. C. 621; *Strauss v. Carolina etc. Loan Assn.*, 117 N. C. 308; 53 *Am. St. Rep.* 585; *Atkins v. Crumpler*, 118 N. C. 532.

This being so, the sale of W. L. Hill to Wilson and the sale of Wilson to the defendant, Friday Hill, were only equitable assignments of the note and mortgage from the defendant, Friday Hill, to the plaintiff, Hussey.

This equitable assignment would have authorized W. L. Hill or J. S. Wilson to have compelled a foreclosure and sale through an order of court and a commissioner.

But this is not the case with the defendant, Friday Hill. He has no equity. When he purchased the note, or the equitable interest in the note—his own note—it was not an ³¹⁷ assignment to him, but a satisfaction. He could not ask a court of equity to sell his land to pay his debt. Upon Friday Hill becoming the owner, the equitable owner of the note, it was in law discharged, and this left the land subject to the second mortgage.

It was contended that, as Hussey became the assignee of the second mortgage before he sold the first note and mortgage to W. L. Hill, he was estopped to enforce the Stanford (second) mortgage. But we have re-examined this question, and can see no elements of estoppel in it. In the first place, both mortgages

were on record, and it is not alleged that Hussey said anything to Hill calculated to deceive him. If Hussey had sold Hill the second mortgage, without saying anything to him about the first mortgage, there might have been some ground for complaint. But how there can be, when he sold the first mortgage which was a prior lien to the Stanford mortgage, we cannot see. The Stanford mortgage did not stand in the way of the Hussey mortgage, and the assignee got all he could have gotten, whether Hussey or Stanford was the owner of the second mortgage.

The question as to whether the warranty of the defendant, Friday Hill, in the Stanford mortgage estopped him from asserting title to the land under the Wilson deed, was learnedly discussed by the defendant's counsel. But it will be seen, from what we have said, that this question has no bearing on the decision of the case.

The usual practice is to dismiss the petition to rehear where the judgment in the former opinion is not reversed. But as the former opinion was not put upon the merits of the case, we will not discuss the petition in this case, but affirm the judgment of the court below.

MORTGAGE—ASSIGNMENT OF—POWER OF SALE.—A mortgage of real estate is not negotiable or commercial paper, either at common law or under the Illinois statutes, and an assignment of it does not convey or transfer the legal ownership. The right acquired by such an assignment is an equitable right only, and a sale made by the assignee, under a power of sale given by the mortgage to the mortgagee, is valid: *Sanford v. Kane*, 133 Ill. 199; 23 Am. St. Rep. 602, and note; *Lanier v. M'Intosh*, 117 Mo. 508; 38 Am. St. Rep. 676, and note; *Hamilton v. Lubukee*, 51 Ill. 415; 99 Am. Dec. 562, and note. See, also, note to *James v. Morey*, 14 Am. Dec. 513, 514.

BOYD v. REDD.

[120 NORTH CAROLINA, 238.]

CORPORATIONS, LIEN OF UPON STOCK.—At the common law a corporation had no lien upon the shares of its stockholders for debts due from them, and statutes and clauses of charters creating such a lien are in derogation of the common right, and must be strictly construed.

CORPORATIONS, LIEN ON STOCK DOES NOT EXTEND TO PAPER TRANSFERRED TO THEM.—Though a statute or a charter of a corporation gives it a lien on the stock of a stockholder for what he owes it, such lien extends only to transactions between the corporation and its stockholder, and does not include obligations given by him to a third person and afterward assigned to the corporation.

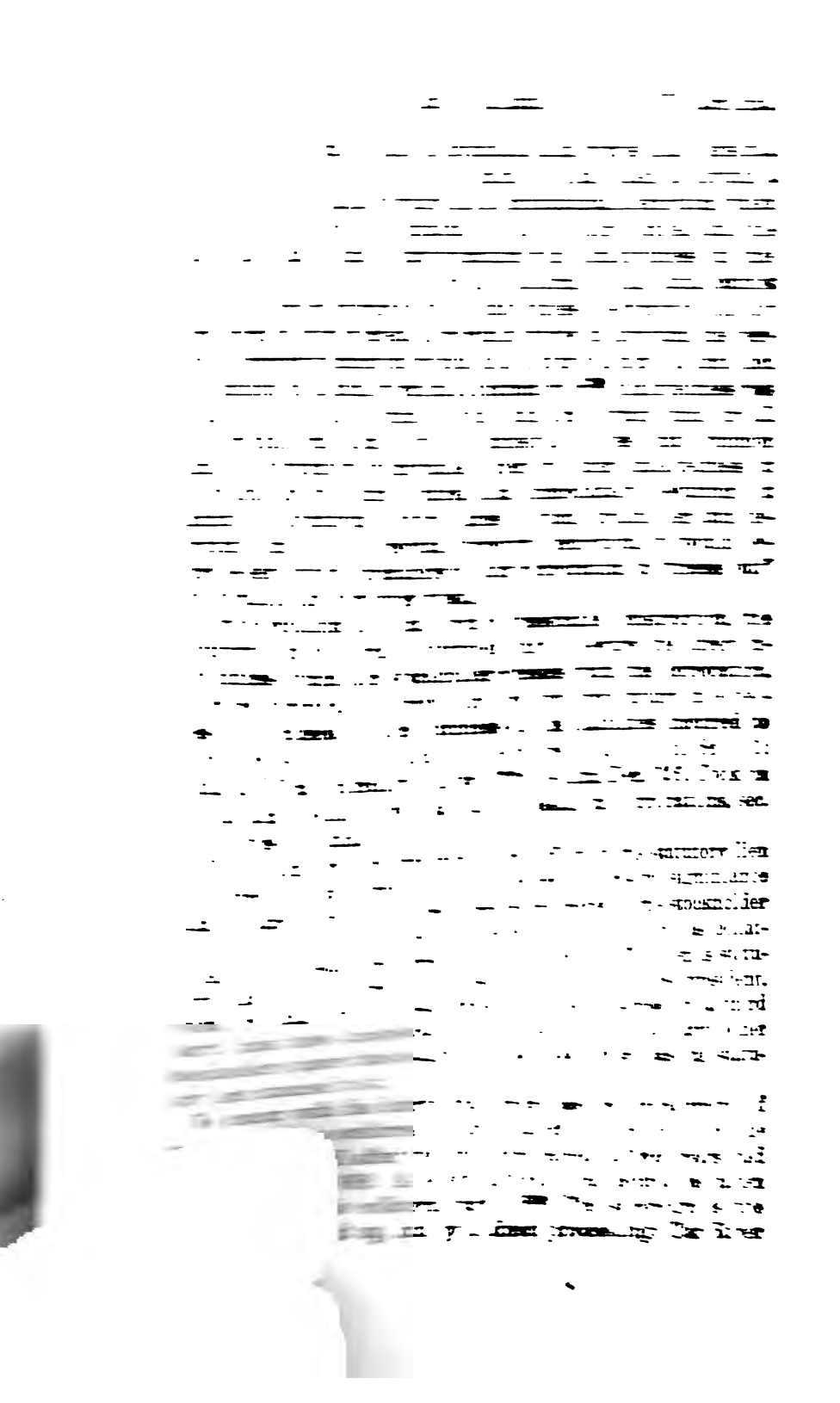
CORPORATIONS.—THE FAILURE OF A CORPORATION TO COMPLETE ITS ORGANIZATION within the time directed by law cannot be taken advantage of in a collateral proceeding.

J. T. Pannill, for the appellant.

J. T. Morehead and Johnston & Johnston, for the defendant.

³³⁶ CLARK, J. "It is clear that at common law a corporation has no lien upon the shares of its stockholders for debts due from them to the company. The policy of the common law has always been to discountenance secret liens, inasmuch as they hinder trade, and restrict the safe and speedy transfer of property": Cook on Stocks and Stockholders, sec. 520; 2 Thompson on Corporations, sec. 2317; 2 Waterman on Corporations, 227; Heart v. State Bank, 2 Dev. Eq. 111. The statute, in such cases being in derogation of common right, must be strictly construed to the purpose of its enactment. That purpose is thus clearly stated in Bank of Utica v. Smalley, 2 Cow. 770; 14 Am. Dec. 526. "This clause in bank charters is intended merely for the protection of the bank, i. e., to give them a lien on the stockholder for what he owes the bank. It is conceded that for any indebtedness a stockholder incurs to a bank directly, whether as principal or surety, his stock in bank is collateral security by virtue of the terms of such charters. ³³⁷ The stockholder knows that fact when he makes the bank his creditor. By such voluntary act he gives the lien and waives his constitutional right to a personal property exemption. As to the direct indebtedness of A. J. Boyd to the bank, it holds thirty-seven shares of his stock, which is admittedly sufficient to pay that indebtedness. A. J. Boyd, however executed the note to the plaintiff as guardian on the 4th of August, 1893, which is the subject of this action, and, to secure the same, deposited with him forty other shares of stock of the bank as collateral. In April, 1893, A. J. Boyd had executed his two notes, aggregating seven thousand three hundred dollars, to the Hermitage Cotton Mills, which notes, together with many others, were deposited in June, 1893 (being indorsed in blank), by said Cotton Mills with the bank (of which said A. J. Boyd was president) as collateral to secure an indebtedness of the Cotton Mills to the bank.

The question is, whether, as to this indirect indebtedness of A. J. Boyd to the bank, by reason of its taking his paper to another party, it acquires a lien upon the forty shares of stock and thereby renders worthless his deposit of the stock with the plaintiff as collateral. When the stockholder, as we have said, makes the bank his creditor, knowing the statute, he voluntarily as-



NAV. Co. v. Neal, 3 Hawks, 520; **Elizabeth City Academy v. Lindsey**, 6 Ired. 416; 45 Am. Dec. 500; **Asheville Division No. 15 v. Aston**, 92 N. C. 578.

But, for the misdirection to the jury, there must be a new trial.

STATUTES—IN DEROGATION OF THE COMMON LAW—CONSTRUCTION.—Change in the rule from the common law is not presumed from the enactment of a statute upon the same subject, unless the statute is explicit and clear in that direction: **People v. Palmer**, 109 N. Y. 110; 4 Am. St. Rep. 423, and note; **Wilson v. St. Louis etc. Ry. Co.**, 108 Mo. 588; 32 Am. St. Rep. 624, and note.

CORPORATIONS—LIEN UPON STOCK.—A corporation may make by-laws regulating the transfer of its stock, but it cannot thereby create a secret lien on the stock which would adhere to it in the hands of a bona fide purchaser without notice: **Bank v. Durfee**, 118 Mo. 431; 40 Am. St. Rep. 306, and note. See note to **Craig v. Hesperia etc. Co.**, 54 Am. St. Rep. 321, and monographic note to **Victor G. Bloede Co. v. Bloede**, 57 Am. St. Rep. 393-395.

CORPORATIONS—FAILURE TO COMPLETE ORGANIZATION. A cause of forfeiture cannot be taken advantage of or enforced against a corporation collaterally or incidentally, or in any other mode than by a direct proceeding: Monographic note to **State v. Atchison etc. R. R. Co.**, 8 Am. St. Rep. 193-197.

DIXIE CIGAR COMPANY v. SOUTHERN EXPRESS Co.

[120 NORTH CAROLINA, 348.]

CARRIERS.—STIPULATION IN BILLS OF LADING RESTRICTING the common-law liability of carriers are invalid unless reasonable.

CARRIERS—RESTRICTIONS UPON LIABILITY WHEN UNREASONABLE AND INVALID.—A stipulation in a bill of lading that a carrier shall not be liable for any loss or damage, unless the claim therefor shall be presented in writing at the office of the carrier within thirty days after the date of such bill is unreasonable and void.

Action against a common carrier to recover the value of a package delivered to it in April, 1893, for shipment to Mexico, and which had not been delivered as agreed. The defendant relied upon a stipulation in the receipt, or bill of lading, given by it as follows: "In no event shall the Southern Express Company be liable for any loss or damage, unless the claim therefor shall be presented to them in writing at this office within thirty days after this date, in a statement to which this receipt shall be attached." The defendant transmitted the package in an envelope, on which was the following instruction to its agents, "If not delivered in thirty days, return to shipper, unless otherwise specifically instructed." The trial court held that the stipulation was unreasonable, and that the failure of the plaintiff to comply therewith constituted no defense to the action.

sents to the stock being impounded, and waives his personal property exemption. But he cannot be thus taken as giving a lien on his stock and waiving his constitutional exemption when he executes a bond or contracts a debt to other parties, and the fact that such other party transfers the indebtedness of the stockholder, either by sale or as a collateral to the bank, cannot have the effect of giving to the indebtedness a security it did not have when it was created, nor can it waive in invitum the personal property exemption which the debtor did not do, and had no intention of doing, when the contract or ³³⁸ indebtedness was made. Besides, the funds of the bank are a trust fund for all the stockholders, and if it is admissible to use that common fund for buying up negotiable paper or other indebtedness of a stockholder to third parties, and immediately securing it against his intention by the shares of such stockholder and depriving him of his personal property exemption, it would become easier for the managers of any corporation to "freeze out" any stockholder they may wish.

Our conclusion is, that upon a reasonable construction, the statutory lien on stock is intended only to secure the direct indebtedness which the stockholder creates with the corporation, either as principal or surety, and not any involuntary indebtedness to it caused by the purchase of his liabilities incurred to third parties: *White's Bank v. Toledo Ins. Co.*, 12 Ohio St. 601; *Bank of Utica v. Smalley*, 2 Cow. 770; 14 Am. Dec. 526; *Cook on Stocks and Stockholders*, sec. 529; 2 *Beach on Corporations*, sec. 645; *Cross v. Bank*, 1 R. I. 39.

This being the construction of the effect of the statutory lien conferred by such provisions in a charter, it has no significance and is purely incidental, that, when the notes of the stockholder Boyd to a third party were deposited with the bank as collaterals, Boyd himself was president of the bank. The lien is statutory, and not conferred by an estoppel; and Boyd as president, when the bank took by assignment his indebtedness to a third party, must have understood it as being taken like any other stockholder's paper thus bought in, and that there was no statutory lien attached to it.

We concur with his honor that there was no impairment of whatever lien was conferred by the charter by the delay of the bank to organize till after the statutory period of two years had elapsed: *Code*, sec. 688. A defect of that kind cannot be taken advantage of in this collateral way. ³³⁹ The sovereign is the proper party to set it up, and by a direct proceeding: *Tar River*

Nav. Co. v. Neal, 3 Hawks, 520; *Elizabeth City Academy v. Lindsey*, 6 Ired. 476; 45 Am. Dec. 500; *Asheville Division No. 15 v. Aston*, 92 N. C. 578.

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Jones & Patterson, for the plaintiff.

Watson & Buxton, for the defendant.

349 CLARK, J. Stipulations in a bill of lading restricting the common-law liability of a common carrier are invalid, unless reasonable; because the parties are not dealing on an equal footing: *Railroad Co. v. Lockwood*, 17 Wall. 357. We think his honor properly held that a stipulation that the defendant would not be liable unless there is a demand in writing made within thirty days from the date of the bill of lading was unreasonable and void. The instructions **350** to its agents upon the back of the defendant's envelopes and packages recognize this, for those instructions require the agent at the receiving point, when the consignee cannot be found, to notify him through the mail, and if the package is not delivered in thirty days to return it to shipper. This contemplates the loss of time going and returning, plus thirty days' detention at the receiving point. To require, therefore, every shipper to visit the express office and demand in writing pay for his package, before the time has expired in which it should be returned, under penalty of losing pay for same if lost by negligence or other default of the express company, is an unreasonable requirement. The consignor, having intrusted the package to the common carrier for a consideration, is entitled to rely upon the carrier's doing its duty without worrying its agents or himself with constant inquiries whether it has done so or not. If the package is returned for failure to find the consignee, or is lost or stolen, the carrier should notify the consignor. We are inclined to think, in analogy to the ruling as to telegraph companies (*Sherrill v. Western Union Tel. Co.*, 109 N. C. 527), that a stipulation would be reasonable that the consignor or consignee should make his demand, within sixty days after he has notice of his loss or damage, that he intends to hold the carrier responsible for negligence or other default, so that the carrier may perpetuate the evidence of its shifting agents, and this does not abridge the statutory time in which the action can be brought.

The stipulation here being void, and the action having been brought within three years, the plaintiff was entitled to recover.

No error.

CARRIERS—POWER TO LIMIT COMMON-LAW LIABILITY.—A common carrier may, by contract, limit his common-law liability so far as is reasonable, but it is unreasonable to allow him to contract against his own negligence: *Davis v. Central etc. R. R. Co.*, 60 Vt. 290; 44 Am. St. Rep. 852, and note; *Meuer v. Central etc. Ry. Co.*

5 S. Dak. 508; 49 Am. St. Rep. 898, and note; Duntley v. Boston etc. R. R., 66 N. H. 263; 49 Am. St. Rep. 610, and note.

CARRIERS—CONTRACTS AS TO NOTICE BY SHIPPER OF LOSS—WHEN REASONABLE.—Whether or not a stipulation in a bill of lading that "claims for loss or damages must be presented to the delivering line within thirty-six hours after the arrival of the freight" is reasonable is a question for the jury, under all the circumstances of the case: Texas etc. Ry. Co. v. Adams, 78 Tex. 372; 22 Am. St. Rep. 56. See, also, Selby v. Wilmington etc. Ry. Co., 113 N. C. 588; 37 Am. St. Rep. 635, and note.

QUINN v. LATTIMORE.

[120 NORTH CAROLINA, 425.]

ELECTIONS—OMISSION OR MISCONDUCT OF REGISTERING OFFICERS.—A qualified elector cannot be deprived of his right to vote by the willful or negligent acts of the registrar. Hence, it is no ground for rejecting the vote of an elector, whose name appears on the registration books, that he was not sworn by such officer, as by law required, before entering his name on such books.

ELECTIONS, REGISTRATION BY UNAUTHORIZED PERSONS.—Electors whose names appear on the registration books cannot be deprived of their right to vote on the ground that the persons registering them were not regularly appointed, the acts of such persons having been recognized and ratified by the election officers.

ELECTIONS.—IF A PERSON VOTES IN BAD FAITH, and not through any mistake, in a township different from that in which he lives, his ballot should be rejected in an election contest.

ELECTIONS—VOTES CAST IN A TOWNSHIP IN WHICH THE VOTER DID NOT RESIDE.—Electors who live on or near the dividing line between two townships cannot be regarded as acting in bad faith in voting in the township in which they had been registered for many years, and where they had been in the habit of voting, paying their taxes, and sending their children to school, though they knew that their residence was not in such township, it appearing that all were entitled to vote somewhere in the county, and that no person was prejudiced by their casting their votes in one township rather than in the other.

ELECTIONS—OBJECTIONS TO VOTERS, WAIVER OF.—If a vote is received and deposited by the judges of an election, it is presumed to be legal, although the voter may not have complied with all the requirements of the registration law, provided he is otherwise qualified to vote. Hence, if an elector has done all the acts entitling him to be registered, and supposes that his registration is perfect, but, through neglect of the register, his name does not appear on the books, but he is, nevertheless, allowed to vote, his vote should not be excluded in a subsequent election contest.

ELECTION CONTESTS—EVIDENCE TO CONTRADICT RETURNS.—The result of a count of votes made by officers of an election and declared by them cannot be overcome by the production of a tally sheet showing a different result, if such sheet has been kept in a public place to which all persons had access, and there is nothing to show that it has not been tampered with. A finding based upon such sheet only is not supported by sufficient evidence.

D. W. Robinson, M. H. Justice, R. Z. Linney, and J. C. Pritchard, for the plaintiff.

Jones & Tillett, W. J. Montgomery, and Webb, Frick & Ryburn, for the defendants.

⁴²⁷ FURCHES, J. This is an action of quo warranto brought for the purpose of trying the title to the office of clerk of the superior court of Cleveland county, resulting from the election of 1894. The case was referred by consent to Armstead Burwell, who filed his report to spring term, 1896, to which the defendant filed fifty-seven exceptions, and the plaintiff, by way of assignment of error, filed thirty-seven. The case presented to this court on appeal, including the report of referee, the judge's findings, exceptions, and briefs, contains three hundred and sixty-eight pages of printed matter.

According to the referee's findings and report the plaintiff was elected by nine majority, and according to the findings and judgment of the court the defendant was elected by thirty majority.

The principal grounds of contention between the parties may be classified and reduced to four: 1. As to persons ⁴²⁸ who registered and voted in other townships than those in which they resided; 2. As to those who were irregularly registered—some not being sworn when they were registered, and others not being registered by the registrar, but by other persons who had the registration books in their possession and acted for the registrar in making these registrations; 3. An alteration of five votes in township No. 6, after the votes had been counted and announced on the night of election; 4. The alteration in township No. 8 of six votes after it had been counted, declared, and certified by the judges of election on the night of the election. The consideration of these four questions, and a few others that do not fall strictly within the principle involved in either of them, will decide the main issue and determine whether the plaintiff or the defendant was elected to this office.

This is a government of the people, by the people, and for the people, founded upon the will of the people and in which the will of the people legally expressed must control: Const., art. 1, sec. 2.

Every male person born in the United States, or naturalized, twenty-one years of age, and who shall have resided in the state twelve months next preceding the election, and ninety days in the county in which he offers to vote, shall be deemed an elector:

Const., art. 6, sec. 1. It shall be the duty of the general assembly to provide from time to time for the registration of all electors, and no person shall be allowed to vote without registration, or to register without first taking an oath to support the constitution: Const., art. 6, sec. 2.

In construing these provisions of the constitution, we should keep in mind that this is a government of the people, in which the will of the people—the majority—legally expressed, must govern and that these provisions and all ⁴²⁹ acts providing for elections should be liberally construed, that tend to promote a fair election or expression of this popular will. The second section of article 6 was adopted for this purpose, and we are to presume that all election laws, enacted since, have been passed with the same end in view. This section of the constitution provides that the "general assembly" shall pass registration laws, and that no one shall be entitled to register without taking an oath, and that no one shall vote who is not registered. This provision of the constitution, that no one shall be entitled to register without taking an oath to support the constitution of the state and of the United States, is directed to the registrars. It must be to them and to them alone, as is said by this court in *Southerland v. Goldsboro*, 96 N. C. 49. But if the registrar, through inadvertence, registers a qualified voter, who is entitled to register and vote, without administering the prescribed oath to him, shall he, for this negligence of the officer, be deprived of his right to vote, and thereby the will of the majority defeated? And, if this omission was not through inadvertence, but with a view to entrap the voter and thus defraud him out of his vote, it is much more the reason why he should not be, and that such methods should not be allowed to prevail. We do not hold that, where a registrar proposed to administer the oath, and the party wishing to be registered refuses to take the oath, it is the duty of the registrar to register him. We would say that under such circumstances he should not be registered. These are matters for the registrar, as has been said in *Southerland v. Goldsboro*, 96 N. C. 49. But it seems that all the parties who registered without being sworn, and voted without being objected to, had been registered before, and the presumption is they had been sworn at that time; and, if they had been, how many times must they be sworn?

⁴³⁰ Article 6, section 1, prescribes the qualifications of an elector, and section 2 of this article is a disabling clause (*Chester etc. R. R. Co. v. Commissioners*, 72 N. C. 486; *Norment v. Charlotte*, 85 N. C. 387) placed in the hands of the registrar. And a

qualified elector cannot be deprived of his right to vote, and the theory of our government that the majority shall govern be destroyed, by either the willful or negligent acts of the registrar, a sworn officer of the law. This would be self-destruction, governmental suicide.

We, therefore, hold that where an elector's name appeared on the registration books he had a right to vote, whether he was sworn or not, unless he was challenged, and this was not made a ground of challenge. It was a matter for the registrar and not for the judges—though in this case it does not appear that any of these voters were challenged. These rules are intended for the guidance and government of registrars, which they should observe in the discharge of their duties as registrars, so as to promote the object to be obtained—the free, full, and fair expression of the will of the qualified voters, as prescribed in section 1, article 6, of the constitution.

It appears that a number of persons were registered by other persons than the regularly appointed registrars; in one instance, by the son of the registrar in the absence of his father, and in another case by Williams, the register of deeds, with whom the registrar had left the registration books. These registrations were irregularly made, and might have been rejected and erased by the registrars. But it would not have been fair for them to have done this without notifying the parties, so registered, in time for them to have registered again. But, instead of their doing this, they retained these names on their books, which they and the judges of election used on the day of election, thereby ratifying and approving these registrations. And ⁴³¹ it would now be a fraud on the electors, as well as on the parties for whom they voted and also upon the state, to reject these votes for this irregularity. These votes cannot be rejected for this reason.

Another class of voters are a number of persons who lived on or near the dividing line between different townships, and voted in a different township from that in which they lived. The most of these votes were allowed by the learned and painstaking referee. But a number of those allowed by the referee were rejected by the court, and it is found and made a part of the judgment of the court that they so voted in bad faith. We say it is found, and we say this advisedly, as it appeared from the argument before us and the judge's notes, which were exhibited to us and commented upon, that the judge found no facts, but simply noted that the exception was "sustained" or "overruled." And it was contended this was handed to counsel who prepared the

judgment and findings therein, and sent them to the judge who signed and returned them to the clerk some time after the court adjourned. Permission was given him to make out his findings and to put them in writing, and to sign the judgment after court, and there is no complaint as to the time when these findings and judgment were filed. But the complaint is, that they are not the findings of the court. But the learned counsel for the defendant argued that this was the practice in North Carolina; that the attorney of the successful party prepares the judgment of the court. And this is true. But the counsel for the plaintiff, while admitting this to be the practice, contends that this practice only obtains as to preparing the judgment upon facts found, and not as to the findings of fact. And this must be the correct rule of practice. But this is a matter we do not care to discuss further; for if, in fact, they were not originally found by the court, as the plaintiff ⁴³³ contends, the court signed them and stands sponsor for what is found, and we will treat them as his findings.

The findings of the court, of bad faith, bring these liners within the rule laid down in *Boyer v. Teague*, 106 N. C. 576, 19 Am. St. Rep. 547, and the court rejects their votes.

But as the plaintiff contends that this finding of bad faith on the part of these voters is without any evidence to support the finding (*Wittkowsky v. Wasson*, 71 N. C. 451), it becomes our duty to examine the evidence upon this finding of bad faith. And we find from the evidence that one or two of these voters stated that they knew at the time of the election that they did not live in the township in which they voted. But we find from the uncontradicted evidence that they all lived at or near the dividing line—some of the evidence tending to show that the line ran through the house of one of them, there was no definitely located line, and that they had all registered and voted before the election of 1894 in the same township in which they then voted, some of them for as long a time as fourteen or fifteen years; that they gave in and paid taxes in the townships in which they voted, and sent their children to school in these townships; and that they were qualified under section 1, article 6, of the constitution. Taking this undisputed testimony into consideration, in connection with that of one or two of them who stated that they knew they were outside by a few yards, does not, in our opinion, show any evidence of bad faith: *Wittkowsky v. Wasson*, 71 N. C. 451. They were entitled to vote somewhere. So there was no bad faith

in voting. These votes would have counted just as much as they did, if they had been cast in the township where the defendant contends they should have been cast. The object of the law—a fair and full expression of the will of the qualified voters—must be kept in mind. And if this has been obtained and no fraud appears, this court will not ⁴³³ look for mere irregularities to defeat this will: *Wilmington etc. R. R. Co. v. Commissioners*, 116 N. C. 563; *McDonald v. Morrow*, 119 N. C. 666; *Harkins v. Cathey*, 119 N. C. 649. All these parties, whose votes we have been considering, were registered voters—some of them, as we have seen, in an irregular manner, still they were registered, and *Southerland v. Goldsboro*, 96 N. C. 49, cited and relied on by defendant, does not apply to them.

But what may be a good reason for not allowing a party to register is not always a good reason for rejecting his vote after it has been cast. There is some similarity between a vote cast and an objection to evidence, under section 590 of the code, where the answer does not suit the opposite side, but it is too late to object after the answer is made: *Meroney v. Avery*, 64 N. C. 312.

We have been discussing the right to register and the right to reject a vote when once cast, mostly on general principles. We now propose to show that the views we have expressed are sustained by authority.

A vote received and deposited by the judges of election is presumed to be a legal vote, although the voter may not have complied with the requirements of the registration law; and it then devolves upon the party contesting to show that it was an illegal vote, and this cannot be shown by showing that the registration law had not been complied with: *Pain on Elections*, sec. 360. A party offering to vote without registration may be refused this right by the judges for not complying with the registration law. But if the party is allowed to vote and his vote is received and deposited, the vote will not afterward be held to be illegal, if he is otherwise qualified to vote: *Pain on Elections*, sec. 361. And where a voter has registered, but the registration books show that he had not complied with all the minutiae of the registration law, his vote will not be ⁴³⁴ rejected: *Pain on Elections*, sec. 361. If a voter is registered in one township, he has no right to register and vote in another. But if he is allowed to do so, his vote received and counted, and he is otherwise qualified, and votes at no other place, his vote should not be thrown out on that account: *Pain on Elections*, sec. 366. It is the right of parties to

have the fairness of elections inquired into for the protection of honest electors. But such legislation is not to be regarded as hostile to the right of a free exercise of the right of franchise, and should receive such construction by the courts as will be conducive to a full and fair expression of the will of the qualified voters: *Pain on Elections*, supra.

It follows from what we have said and the authorities cited that *State v. Scarborough*, 110 N. C. 232, is overruled, and the more liberal construction placed upon the statute in the dissenting opinion, is approved.

For the reasons heretofore given and the authorities cited, we are of the opinion that the vote of the liners, who voted in different townships from those in which they resided, being qualified voters and voting at no other place, should not have been rejected by the court.

The vote of E. R. Rudisel and the exception raise another ground of infirmity, that he had changed his residence to South Carolina and did not return to this state till within less than one year prior to the election. It was shown and not disputed that he went to South Carolina, where he remained for more than a year, exercising his right of franchise, voting in a town election while there. But it was contended by the defendant that he did not intend to change his citizenship; that he was a member of a military company in Cleveland county during all this time; that he returned to attend its musters and was elected a lieutenant during this time. The referee, Burwell, held that he had changed his citizenship, and excluded his vote. But the ⁴³⁵ court found that he had not changed his citizenship, and overruled the referee and restored this vote to the defendant. And as there is some evidence to sustain the finding of the court, this finding must stand.

We also sustain the vote of George Otterson. He went to the registrar within the time allowed, and the registrar administered the registration oath to him and he left thinking he had been registered. But, through the neglect of the registrar, or for some other reason, his name did not appear on the registration books on the day of election. These facts being made to appear, he was allowed to vote and did vote. The court held that this vote was improperly received and excluded it. In this there was error. The judges might have refused to allow him to vote, and this would have presented another question. But they allowed him to vote, as they should have done, in our opinion. And his

vote being in, and he being in all other respects a qualified elector, his vote should not have been excluded.

In our opinion E. L. Jenkins should have been allowed to vote. He was born and raised in this state, afterward moved to South Carolina, but returned to Cleveland county, in this state, one year and three days before the election. He offered to register the day the registration books were closed, but was not allowed to do so, as it lacked seven days of being one year since he returned to live in this state. This action of the registrar was proper. But on the day of election, when he had been a resident of this state for one year and three days, he asked to be registered, and, with tickets in hand, proposed to vote. But he was refused registration and his vote was also refused. He proposed to vote for the plaintiff, and, being otherwise a qualified voter, his vote should have been received and counted: Code, sec. 2682; McCrary on Elections, sec. 102.

⁴³⁶ This brings us to the consideration of No. 6 and No. 8 townships, and we propose to consider No. 6 first. The referee, Burwell, finds as facts that on the evening of the election, at the close of the polls at No. 6, the boxes were opened and the vote counted by the judges and such other electors as chose to attend; and at this counting it was found that the defendant, Lattimore, had received five hundred and forty-eight votes, and this result was then and there so declared. The referee further finds that the defendant had not produced evidence sufficient to change the result of this count and declaration of the vote, and declares that the defendant's vote at No. 6 was five hundred and forty-eight.

But the judgment of the court finds that the vote was counted and declared, after the polls were closed, on the evening of the election at No. 6, and at this count the defendant only received five hundred and forty-eight votes, and this was officially declared as the result. The court further finds that this count was not correct, and that defendant insists that this is a finding of fact, and, there being some evidence to support it, it is binding on this court.

This is admitted to be the rule adopted by this court, that where there is evidence both ways, the court will not review the findings of the court below, and we do not propose to invade this rule of practice, whatever our opinion may be as to the correctness of the finding. But the law makes this count and declara-

tion of the result, *prima facie* at least, the legal result of that election, until it is shown to be incorrect by proper and competent evidence. This, of course, might be shown by competent evidence, such as showing that a fraud had been committed upon the plaintiff in falsely declaring the vote. But no such evidence as this was introduced. The only evidence introduced to show that this count on the evening of the election was not correct was a tally sheet kept at the time of the count, turned over ⁴³⁷ to Tiddy, and placed by him in an unlocked safe in the register's office, where it remained all night. Next morning he took it out of the safe and put it in a pigeon hole over a desk in the same office, where it remained during that day. It appeared that this was a public office where all persons could go that had occasion to do so; that during this day it became known that the election between the plaintiff and defendant was very close, and that a few votes would change the result, which then appeared to be in favor of the plaintiff. It cannot be that such evidence as this, if it possessed no internal evidence of having been tampered with, could be allowed to rebut a legal presumption and change the result of an election. This count, at the time of election, is held to be more reliable than any count, after there had been an opportunity for the vote to be tampered with: *McCrary on Elections*, sec. 440. The supreme court of California refused to allow a recount upon its being shown that the ballots had not been kept in such a manner that they could not have been tampered with: *McCrary on Elections*, sec. 441. Where there has been an opportunity for the vote to be tampered with, it loses its character as primary evidence: *McCrary on Elections*, sec. 441.

We, therefore, hold that the findings or declarations contained in the judgment of the court, that the referee committed an error in sustaining the original count, and that the defendant only received five hundred and forty-eight votes at No. 6 township, is error, but that he received five hundred and fifty-three votes is without evidence to support these findings; that the tally sheet relied on by the defendant (and this being the only substantive evidence), having been exposed and liable to be tampered with, had lost its character as primary evidence, and could not be relied on to prove anything.

We therefore overrule the court, and sustain the ruling of Referee Burwell, and find that the defendant Lattimore's vote at No. 6 precinct was five hundred and forty-eight and not five hundred and fifty-three.

⁴³⁸ As we have passed upon this exception, overruling the court, holding that there was no competent primary evidence to sustain the finding, we will state that we have thoroughly examined this tally sheet, without and also under a heavy magnifying glass. And while, under the rules of this court, we did not consider ourselves at liberty to find facts upon which to base our judgment, it is manifest to us that this tally sheet has been tampered with. The figures are admitted to have been changed from 548 to 553. But this is not what we refer to. The right hand tally on the third row bears internal evidence of not being of the same make as the others. The cross stroke of every other tally is horizontal, or the right end is the highest, while in this tally the right hand end of the cross stroke is considerably lower than the other end. Also, the first two down strokes bear evidence of not having been made at one stroke of the pencil, as would likely be the case in the hurry of tallying the vote, as it was counted. The second down stroke, especially, is forked at the lower end, as is quite apparent under a heavy glass. Without making any charge against anyone, as this could not be done, the paper having been exposed in a public office for so long a time, and without any disposition to do so, if we could, we are of the opinion it has been tampered with.

The discussions and rulings we have made, being decisive of the question before us, no matter whether we should decide the controversy as to the vote in No. 8 one way or the other; and as any ruling we might make as to this contention would not affect the result, and as we have examined it sufficiently to know that its solution is not without trouble, we have not and will not consider this exception.

The investigation of the case results in finding that the plaintiff is entitled to have counted for him the following ⁴³⁹ votes that he was not allowed to have by the finding and ruling of the court, to wit: John Surat, Lawson Kindrick, Henderson Sanders, John Jameson, James Crosby, Julius Crosby, Pinckney Crosby, R. C. Hoyle, W. P. Costner, R. C. Ledford, Caleb Ledford, David Pratt, Ed. Rankin, Reuben Posten, J. McRollins, John Porter, Batts McIntyre, William McLaney, S. A. McLaney, W. A. Pryer, Sylvanus Gordon, Sam Towrey, George Otterson, John Chapion, S. R. McMurray, E. L. Jenkins, Bish Hamrick, Daniel McSwain, Calhoun Russ, Ezzell Russ, George Price, Webb White, Floyd Havener, A. A. Hendrick, M. V. Turner, and G. R.

Smith. And the plaintiff is also entitled to five votes in No. 6 township that he was not allowed by the judgment of the court—making, in all, forty-one.

And we find that the defendant is entitled to have counted for him the following named voters that he was not allowed by the ruling and judgment of the court, to wit: John Posten, Will Posten, F. P. Gold, Philip Martin, and Randall Roberts—making five in all.

Thirty, the majority found for the defendant by the court, deducted from forty-one, leaves eleven, and five which we find the defendant entitled to, that he was not allowed by the judgment of the court, deducted from eleven, leaves the plaintiff elected by six majority.

The judgment of the court, therefore, should have been that the plaintiff, Quinn, was duly elected to the office of clerk of the superior court for the county of Cleveland, and is entitled to the same and the fees and emoluments thereof from the first Monday in December, 1894, and for the next four years then next ensuing. There is error, and judgment will be rendered according to this opinion.

ELECTIONS—MISCONDUCT OF ELECTION OFFICERS—REGISTRATION.—Mere irregularities on the part of election officers, or their omission to observe some merely directory provision of the law, do not vitiate the election: *Parving v. Wimberg*, 130 Ind. 561; 30 Am. St. Rep. 254, and note; *Moyer v. Van de Vanter*, 12 Wash. 377; 50 Am. St. Rep. 900, and note. The legislature has power to pass proper and reasonable registration laws: Note to *Southerland v. Norris*, 28 Am. St. Rep. 260; but no such law can deprive a voter of his constitutional right to vote except as a penalty for his own fault or negligence: *Attorney General v. Detroit*, 78 Mich. 545; 18 Am. St. Rep. 458, and note. See, also, *Boyer v. Teague*, 106 N. C. 576; 19 Am. St. Rep. 547, and note.

ELECTIONS—UNLAWFUL VOTING—RECEPTION OF ILLEGAL VOTES.—The reception of illegal votes at an election does not affect its validity, unless it is shown that their reception affected the result: *People v. Cicott*, 16 Mich. 283; 97 Am. Dec. 141, and note. Where a person votes at an election without having been registered, and without any proof of right, if it does not appear that he was challenged, or that any objections were made to his voting, the presumption must be that he was a legal voter and so known to the judges of election: Monographic note to *People v. Pease*, 84 Am. Dec. 268, and extended note to *People v. Bates*, 83 Am. Dec. 750.

ELECTION CONTESTS—BURDEN OF PROOF.—Poll-books and tally sheets made out and properly certified by the election officers, and the ballots themselves are the primary evidence of the result of an election: *Dixon v. Orr*, 49 Ark. 238; 4 Am. St. Rep. 42. In an election contest the burden of proof is upon the party who seeks to set aside the returns: Note to *Kreitz v. Behrensmeyer*, 8 Am. St. Rep.

378; *Tebbe v. Smith*, 108 Cal. 101; 49 Am. St. Rep. 68, and note; note to *Boyer v. Teague*, 19 Am. St. Rep. 567. See, also, important note to *People v. Pease*, 84 Am. Dec. 268-272.

STATE v. McRAE.

[120 NORTH CAROLINA, 608.]

CRIMINAL LAW—GUILT, PRESUMPTION OF FROM POSSESSION OF STOLEN PROPERTY.—In a prosecution for stealing money an instruction that if the piece testified to have been stolen was stolen on the twenty-first day of a month and was given by the accused to a witness on the 23d of the same month, then the burden of proof shifts, and the defendant is presumed to be the thief, unless he satisfactorily explains his possession, is erroneous.

Attorney General Zeb V. Walser, for the state.

Covington & Redwine, for the defendant.

608 **FAIRCLOTH, C. J.** The defendant stands indicted for stealing thirty dollars in money, and the case shows that it was a twenty dollar gold coin, the property of Edwin Eubanks. There was no direct evidence, and the state relies on the proof of recent possession. Many attempts have been made to tell what constitutes recent possession, such as "soon after," "shortly after," "so soon after the theft as to raise a presumption of guilt" and the like; and then presumptions are held to be strong, slight or weak, etc., and each case is at last disposed of on its particular facts.

We have no disposition to try to add to the list of what constitutes recent possession. Some of them will be found in *State v. Jones*, 3 Dev. & B. 122; *State v. Turner*, 65 N. C. 592; *State v. Graves*, 72 N. C. 482; *State v. Wilson*, 76 N. C. 120; *State v. Patterson*, 78 N. C. 470; *State v. Smith*, 2 Ired. 402; *State v. Rights*, 82 N. C. 675; *State v. Rice*, 83 N. C. 661; *State v. Jennett*, 88 N. C. 665.

Evidence: Eubanks, the prosecutor, testified that he was a postal route agent from Munroe to Atlanta, Georgia. That on January 21, 1897, at 11 o'clock A. M., he had the coin in his pocket at the postoffice in Munroe, when he went to his room at Mr. Courtney's and went to bed, slept till dark, dressed and went to a restaurant and stayed about depot till 9 o'clock P. M., when he took the train for Atlanta, where he arrived next morning, when he missed his gold coin. That the defendant cooked for 610 Courtney, but he did not see her there on the said 21st;

that he found and identified his coin by some private mark on the 25th of January, 1897, in the People's Bank at Munroe.

Wolfe, the cashier, testified that on the 22d or 23d of January a boy, Jack Cohen, brought a twenty dollar gold coin to the bank and got change for it; that he put the coin away among similar moneys and he could not say that it was the one identified by Eubanks.

Jack Cohen testified that on the 23d of January the defendant gave him a twenty dollar gold coin and asked him to get it changed, and said she got it from James Davis, a fireman on the railroad. He gave her the change. He said James Davis was on his run and was not at the trial. Defendant offered no evidence. His honor charged the jury: "If the state has satisfied you beyond a reasonable doubt that the twenty dollar gold piece of the witness, Eubanks, was stolen on the 21st of January, 1897; that the coin found and identified by him in the bank was his; that the coin carried by the witness, Cohen, to the bank on the 23d of January, 1897, was the coin belonging to Eubanks; and that the witness, Cohen, got said coin from the defendant on that day, then the burden shifts and the defendant is presumed in law to be the thief, and unless she satisfactorily explains her possession of the coin it is your duty to convict." Defendant excepted and appealed.

We think, upon this evidence, taken as true, his honor committed error in holding as a legal conclusion that the defendant was guilty.

In all cases, civil or criminal, presumptive evidence is admissible, but, in the latter cases, such evidence is admitted only so far as it has a natural tendency to produce belief under the circumstances in the case. Experience, habits of society, and natural reasoning are to be considered, and ⁶¹¹ such presumption as those matters raise must manifest that the stolen goods have come to the possessor by his or her own act or concurrence. *State v. Smith*, 2 Ired. 402, very well illustrates. The tobacco was stolen on Friday night and found in the defendant's possession next day. The judge told the jury that that was a case of "strong presumption of guilt," and this court held that charge to be error. The character and quality of the stolen property are matters proper for the jury to consider, and should be so presented to them. Money, as a medium in trade, passes rapidly and frequently from hand to hand, and no one doubts the ownership of the possessor unless some peculiar circumstance is present, as is illustrated here by the action of the cashier. How it would be if it was a personal chattel, as an ox or wagon,

would naturally, in the course of common experience, present itself to the mind of a juror, and such matters are proper to be called to his attention. Without any opinion on the question of guilt, we can see how current money may pass several hands in two or three days, without any knowledge or concurrence on the part of the final possessor of the original taking. These are matters to be submitted to the jury as evidence with all attending circumstances, but the law will not give them an artificial operation, and as a legal conclusion pronounce the defendant guilty. The defendant is presumed to be innocent, and that presumption must be overcome and the jury reasonably satisfied of the guilt of the accused. These and other principles must be explained to the jury and let them intelligently consider of their verdict.

From the record before us it does not appear that they were so explained.

Error.

LARCENY—POSSESSION OF STOLEN PROPERTY AS EVIDENCE OF GUILT—INSTRUCTIONS.—The late possession of stolen property is not sufficient to sustain a verdict of guilty of larceny, but it is a circumstance tending to show guilt. An instruction embodying this proposition is not open to the objection that it charges upon matters of fact: *State v. Duncan*, 7 Wash. 336; 33 Am. St. Rep. 888, and note; *Cooper v. State*, 29 Tex. App. 8; 25 Am. St. Rep. 712, and note.

STATE v. NEAL.

[120 NORTH CAROLINA, 613.]

TRESPASSING CHICKENS, RIGHT TO KILL.—One has no right to kill his neighbor's chickens when found damage feasant. The remedy is by impounding them until damage paid, or by an action for damages.

CRIMINAL LAW—CRUELTY TO ANIMALS.—Under a statute declaring that cruelty includes every act whereby unjustifiable physical pain or death is caused, the killing of a neighbor's chickens to prevent their trespassing upon, and injuring, the defendant's garden, is cruelty, though done without torture, nor is it any the less cruelty because done under the impulse of anger.

CRUELTY TO ANIMALS—BURDEN OF PROVING JUSTIFICATION.—It is error to instruct a jury in a prosecution for cruelty in killing chickens, that defendant must prove justification in the killing. Such error is harmless if it is admitted that the only justification was to prevent their trespassing upon defendant's garden and eating up his peas. This invasion of the defendant's right on the part of the chickens does not authorize his inflicting the death penalty.

CRUELTY TO ANIMALS.—INDICTMENT charging that the defendant did knowingly, willfully, and needlessly act in a cruel manner toward certain fowl, to wit, a chicken, by killing such chicken, the said chicken being a useful fowl, etc., is an intelligible charge that the defendant was guilty of cruelty to a useful fowl by needlessly and willfully killing it.

Prosecution for cruelty to animals. The statute under which it was founded declares that: "If any person shall willfully overdrive, overload, wound, injure, torture, torment, deprive of necessary sustenance, or cruelly beat, or needlessly mutilate or kill, or cause or procure to be overdriven, overloaded, wounded, injured, tortured, tormented, or deprived of necessary sustenance, or to be cruelly beaten, needlessly mutilated, or killed, as aforesaid, any useful beast, fowl, or animal, every such offender shall for every such offense be guilty of a misdemeanor: N. C. Code, ed. 1883, sec 2482. The defendant asked that the jury be instructed that chickens were not embraced in the list of animals authorized to be impounded, and, therefore, if the defendant had notified the prosecutor to keep his chickens from trespassing on defendant's crop, and had made reasonable efforts to prevent injury to the crop without injuring or killing them, and the prosecutor had refused or failed to keep up his chickens, then if the defendant, to prevent further injury, killed them, such killing ought not to be regarded as willful, nor the defendant as guilty of the offense charged, and that if the defendant killed the chickens, without needless or willful torture, but simply to prevent them from eating his crop, he was not guilty. Both these instructions were refused. The court also refused, though requested by the defendant, to instruct the jury that, to convict, the jurors must find that the killing of the chickens was the development of a preconceived purpose, and not an impulse of anger excited by unexpectedly seeing the repetition of an annoying trespass, and if the jury believed the defendant killed the chickens without willful torture and without any purpose to do the prosecutor a willful injury, but simply to prevent injury to his crop, then the defendant was not guilty, and that the statute under which defendant was indicted related only to offenses where the injury is directed against the animal killed or wounded, where there is an intent on the part of the offender to willfully injure, torture, or kill the animal without reference to the owner of the animal, and, therefore, if the defendant killed the chickens without any intent to willfully injure, wound, or kill them, he was not guilty. The court instructed the jury

that, in order to convict the defendant, they must find that he willfully killed the chickens, and that the term "willful" implied that the act was done knowingly and of stubborn purpose. The defendant at the trial offered to prove that the chickens were eating his peas, and that he killed them to prevent the destruction of the peas. An objection interposed by the prosecution to this evidence was sustained. The court charged the jury that, in order to acquit the defendant, they must believe from the evidence beyond a reasonable doubt that he was justified in killing the chickens, and that he would not be justified if the killing of them was to prevent the destruction of his crop. Verdict of guilty. A motion was thereafter made in arrest of judgment on the ground that the indictment failed to allege that the killing of the chickens was by torture, cruelty, wounding, or mutilation. This motion being overruled, the defendant moved for a new trial, alleging errors in the instructions given and also in refusing the instructions asked. This motion was overruled, and a fine of one dollar imposed, and the defendant appealed.

Attorney General and J. M. Brown, for the state.

Adams & Jerome and S. J. Pemberton, for the defendant.

616 CLARK, J. This is an indictment for cruelty to animals, to wit: Sundry Stanly county chickens, "tame, villatic fowl," as Milton styles them in stately phrase. The prosecutor and defendant lived very near to each other, and their chickens were exceedingly sociable, visiting each other constantly. But after the defendants had sown their peas they had no peace, for the prosecutor's chickens became lively factors in disturbing both. The younger defendant, Oscar, as impetuous as his great namesake, the son of Ossian, pursued one of the prosecutor's chickens clear across the lot of another neighbor, one Mrs. Freeman, and, 617 intimidating it into seeking safety in a brush pile, pulled it out ignominiously by the legs, and, putting his foot on his victim's head, by muscular effort pulled its head off. Then, in triumph, he carried the headless, lifeless body and threw it down in the prosecutor's yard in the presence of his wife, also letting drop some opprobrious words at the same time. The prosecutor was absent. Another chicken Oscar also chased into the brush pile, and, sharpening a stick, jabbed it at said chicken and through him, so that he then and there died, and Oscar, carrying the chicken impaled on his spear, threw it over into the prosecutor's yard. He knocked over another, and, impaling it in the

same style, also threw its lifeless remains over into the prosecutor's yard, as the Consul Nero caused the head of Asdrubal to be thrown into Hannibal's camp. On yet another occasion Oscar did beat a hen that had young chickens, which, with maternal solicitude, she was caring for, so that she died and the young ones, lacking her care, also likewise perished. The aforesaid Oscar, on other divers and sundry times and occasions, was seen "running and chunking" the prosecutor's chickens. The other defendant, Oscar's father, proposed to the prosecutor "to strike a dead line, and each one kill everything that crossed the line." The offer seemed too unrestricted, and the cautious prosecutor, whose thoughts were "bent on peace," as much as his chickens were on peas, firmly declined the dead line proposition, but Oscar's father said he "guessed he would do that way." As the evidence limited his proceedings to this declaration of war, without any overt act, a *nolle prosequi* was entered as to him, and Oscar was left alone to bear the brunt. "Having," in the language of Tacitus, "made a solitude and called it peace," he naturally protests against being now charged with the odium and burdens of war, which his honor has assessed at a fine of one dollar and costs.

⁶¹⁸ Both defendants and Oscar's mother went on the stand. There was no substantial contradiction of the state's evidence, but all three testified that the prosecutor had been notified to keep his chickens out of their pea patch or they would be killed. This is the "round, unvarnished tale" of the evidence.

The defendant's counsel interposed every consecutive defense from a plea to the jurisdiction to a motion in arrest of judgment.

The case was tried before a justice of the peace, and the defendant appealed. In the superior court, a bill of indictment was found by the grand jury and the defendant was tried thereon. Therefore, in any aspect, there was jurisdiction. Whether the court acquired it by the appeal or had original jurisdiction by the indictment, it is immaterial to decide.

Chickens come within the very terms of the code, section 2482, describing the creatures intended to be protected from man's inhumanity, "any useful beast, fowl or animal." Pigeons were held to be within it: *State v. Porter*, 112 N. C. 887.

The defendants offered to show by Oscar himself that "he killed the chickens to prevent them from destroying the peas." This was to show justification, and was properly rejected. The defendants had no more right to destroy a neighbor's chickens when thus found damage feasant than they would his cattle. The remedy is by impounding them till damage paid, or by an

action for damage. Their destruction is not necessary to his rights: *Clark v. Keliher*, 107 Mass. 406, which was a case "on all fours" with this for killing a neighbor's chickens while trespassing after notice to keep them up. In this state, in like manner, it has been held that one has no right to lay poison, though on his own premises, for another's "egg sucking dog": *Dodson* 619 v. *Mock*, 4 Dev. & B. 146; 32 Am. Dec. 677; nor to kill a "chicken eating hog" as a nuisance: *Morse v. Nixon*, 6 Jones, 293; nor a "breachy hog" for the same reason: *Bost v. Mingues*, 64 N. C. 44. These cases refer to and distinguish *Parrott v. Hartsfield*, 4 Dev. & B. 110, 32 Am. Dec. 673, where it was held lawful to kill a "sheep stealing" dog about to kill sheep. This is because of the fact that such animal could not be easily caught and impounded, nor could he be sold for anything to pay damages. In *Johnson v. Patterson*, 14 Conn. 1, 35 Am. Dec. 96, a very long and learned opinion sustains the proposition that one is not justified in strewing poisoned meal on his premises whereby a neighbor's chickens were killed, though notice was given that this would be done if they were not kept off. It is true, these were actions for damages, and not indictments for cruelty to animals, but if, even in such cases, the trespass is no defense, certainly evidence to show the trespass by an animal was incompetent in an indictment whose gist is merely the fact of cruelty or needless killing: *State v. Butts*, 92 N. C. 784.

The first prayer for instruction was properly refused. If this were stock law territory (which is not in evidence), the killing would be none the less willful: *State v. Brigman*, 94 N. C. 888.

The second prayer was also properly refused. Chickens could be impounded at common law, and besides the "needless killing" of the chickens is of itself cruelty, though done without torture: *State v. Porter*, 112 N. C. 887.

The third prayer, that the jury must find that the defendant "willfully, knowingly, and of stubborn purpose killed the chickens" before they could convict, was given.

The fourth prayer was properly refused. The willful and needless killing of the prosecutor's chickens was none the less cruelty to them because done on an "impulse of anger." Says *Burwell, J.* in *State v. Porter*, 112 N. C. 887: 620 Since the enactment of this statute it has been unlawful in this state for a man to gratify his angry passions or his love for amusement and sport at the cost of wounds and death to any useful creature over which he has control.

The fifth prayer, which contained this: "If the defendant killed the chickens without any intent to willfully . . . kill them, he would not be guilty," was properly refused.

There was no aspect of the evidence tending to show an accidental killing. If the rest of the prayer were correct, it being incorrect as an entirety, the court was not called upon to dissect it and give so much as was good.

The sixth prayer was given, and the seventh, from what has already been said, was properly refused.

The judge stated a correct proposition of law when he told the jury that the defendant was not justified if he killed the chickens to prevent the destruction of his crop (*State v. Butts*, 92 N. C. 784), for he could have prevented it by impounding them, or he could sue for damages. But he erred in telling them that the defendant must prove justification in the killing. The indictment being that the defendant did "knowingly, willfully, and needlessly act in a cruel manner toward a certain fowl, to wit, a chicken, by killing said chicken, the said chicken being a useful fowl, etc., this (rejecting refinement, Code, sec. 1183) is an intelligible charge that the defendant was guilty of cruelty to the useful fowl by needlessly and willfully killing it." But the burden was on the prosecution to prove the "knowingly, willfully, and needlessly." It was not incumbent on the defendant to prove justification. It is not like the killing of a human being which, if done with a deadly weapon, raises a presumption of malice: *State v. Rollins*, 113 N. C. 722; nor yet like the proof of a sale of liquor, which, being shown, the burden devolves upon the defendant to show the license, because it is a matter peculiarly in his own ^{own} knowledge: *State v. Emery*, 98 N. C. 668; nor like cases where an act is made punishable irrespective of intent in which, the act being shown, the burden shifts to the defendant: *State v. Glenn*, 118 N. C. 1194; and it was still greater error to charge that the defendant must prove the matter of justification beyond a reasonable doubt. Even where the burden shifts to the defendant, he needs only to prove it "to the satisfaction of the jury": *State v. Ellick*, 2 Winst. 56; 86 Am. Dec. 442; *State v. Willis*, 63 N. C. 26. But this error in the charge was harmless error, for there was no evidence tending to show that the defendant was justified, and the court properly told the jury that the killing to prevent the destruction of the peas (the only matter in justification relied on) would not justify the defendant. The court might properly have told the jury that, if they believed the evidence, they should find the defendant guilty, for there was no conflict of evidence, and it

amounted to that, since there was no evidence which made a legal defense.

In response to the third prayer, the court properly instructed the jury that they could not convict unless they found that the defendant "knowingly, willfully, and of stubborn purpose" killed the chickens. This is not a case of "intent," which is an inference of inner motive to be drawn by the jury: *State v. Coy*, 119 N. C. 901, but of conduct, cruelty, independent of intent if willful, and the defendant's own evidence proved that the killing was done willfully, and the charge being substantially that, if the jury believed the evidence, he was guilty, was correct: *State v. Woolard*, 119 N. C. 779; *State v. Riley*, 113 N. C. 648.

What has already been said disposes of the motion in arrest of judgment. The defendant understood fully the charge against him: Code, sec. 1183. The code, section 2490, provides that "cruelty" shall be held to include ⁶²² every act, etc., whereby unjustifiable physical pain, suffering, or death is caused. While the indictment is not carefully drawn, and is, indeed, less accurate than the warrant originally issued by the justice, the charge of "needlessly acting in a cruel manner by killing," is a sufficient charge of cruelty, and is sustained by the uncontroverted proof of impaling one chicken on a sharp stick and beating the hen to death.

Affirmed.

ANIMALS DAMAGE FEASANT—RIGHTS OF INJURED PROPERTY OWNER—IMPOUNDING ESTRAYS.—The law does not justify one in killing his neighbor's valuable dog because the animal has left tracks on his freshly painted porch, has been found on one occasion in his henhouse, and has come around his house at night, chased cats into the trees and barked: *Bowers v. Horen*, 93 Mich. 420; 32 Am. St. Rep. 513, and note. But a landowner was permitted at common law to redress himself by distraining another's cattle damage feasant, and is generally empowered by statute to seize and impound them: Extended note to *Stewart v. Hunter*, 8 Am. St. Rep. 271-273. See note to *Campau v. Langley*, 33 Am. Rep. 416, and *Aldrich v. Wright*, 53 N. H. 398; 16 Am. Rep. 839.

ANIMALS—CRUELTY TO—WHAT CONSTITUTES.—Trapping a trespassing and depredating dog is not "needlessly torturing or mutilating" within a statute against cruelty to animals: *Hodge v. State*, 11 Lea, 528; 47 Am. Rep. 307, and extended note. See, also, *Waters v. People*, 23 Colo. 33; ante, p. 215, and note.

INSTRUCTIONS—HARMLESS ERROR IN.—An instruction stating the law too strongly as against the defendant does not entitle him to a reversal, if, under no proper instructions, judgment could have been given in his favor: *Lake v. Hancock*, 88 Fla. 53; 56 Am. St. Rep. 159; *Gray v. Merriam*, 148 Ill. 179; 89 Am. St. Rep. 172.

CASES
IN THE
SUPREME COURT
OF
SOUTH DAKOTA.

HURON WATERWORKS COMPANY v. HURON.

[7 SOUTH DAKOTA, 2.]

MUNICIPAL CORPORATIONS — WATERWORKS — NATURE AND CHARACTER OF.—There is no distinction between the nature of waterworks property owned and held by a city, and public parks, squares, wharves, quarries, hospitals, cemeteries, city halls, courthouses, fire engines and apparatus, and other property owned and held by the city for public use. All such property is held by the city as a trustee in trust for the use and benefit of the citizens of the municipality.

MUNICIPAL CORPORATIONS — WATERWORKS.—THE POWER TO CONSTRUCT a waterworks system for a city is not a necessary incident of its charter, but must, like all its other powers be derived directly from the legislature; and the power given by charter "to construct and maintain" such a system implies a duty of the city, through its corporate authorities, to maintain and preserve the waterworks property for the benefit of the public.

MUNICIPAL CORPORATIONS—WATERWORKS—PUBLIC USE AND TRUST—BENEFICIARIES.—If a city is empowered, by its charter, "to construct and maintain waterworks," which are constructed, maintained, and used, at the expense of its inhabitants, for protection against fires and for furnishing pure water for domestic purposes, such works are owned and held by the city as the trustee of its citizens, and for the use and benefit of such citizens, who are the beneficiaries. In other words, the property is held for public use and is charged with a public trust.

MUNICIPAL CORPORATIONS — WATERWORKS—RIGHT TO SELL.—If a city, vested by its charter with power to construct and maintain a system of waterworks, at the public expense and for public use, exercises such power, the waterworks property is held by the city for public use, and is, therefore, charged with a public trust, of which the city cannot divest itself without express legislative sanction. Hence, a sale and transfer of the property, by the common council of the city, without legislative authority is void.

MUNICIPAL CORPORATIONS—SALE OF PROPERTY—CONSTRUCTION OF CHARTER.—Power conferred, in general terms, upon a city, by its charter, to sell and dispose of the property

of the city is limited to that class of property held strictly as private property, and not charged with any public use.

MUNICIPAL CORPORATIONS—WATERWORKS, SALE OF—UNAUTHORIZED PAYMENT AND ITS EFFECT.—If a city, under authority of its charter, constructs and maintains a system of waterworks at the public expense, and for public use, and its council attempts to sell and transfer the waterworks, without legislative authority, the city may regain possession thereof, without refunding to the pretended purchasers the amount of money paid by them into the city treasury as the consideration of the purchase, where it has not been appropriated by the council to any city purpose, or in any manner used by it. Such payment into the city treasury is unauthorized, for the money does not belong to the city, and the treasurer has no authority to receive it. His mere receipt, therefore, of the money, does not bind the city to refund it, and cannot estop the city from recovering the property.

Actions involving a right to the waterworks of a city. One action was by the Huron Waterworks Company against the city of Huron, and the other was by H. Ray Myers and Henry Schaller, on behalf of themselves and all other taxpayers similarly situated, against the city of Huron and the Huron Waterworks Company. The actions were consolidated and the city of Huron, H. Ray Myers, and Henry Schaller appealed from the judgment rendered.

A. W. Wilmarth and H. Ray Myers, for the appellants.

John L. Pyle, for the respondent.

¹⁵ **CORSON, P. J.** These two actions were consolidated and tried together in the court below, as they involved substantially the same question. Judgments were rendered in both actions in favor of the Huron Waterworks Company, and from the judgments the city of Huron and H. Ray Myers and Henry Schaller have appealed to this court.

A few paragraphs from the complaint of H. Ray Myers and Henry Schaller and three findings of fact by the court will sufficiently present the case for the purposes of this decision.

¹⁶ It is alleged in the complaint: "3. That heretofore, and during the years 1883 and 1884, under and by virtue of the power conferred by said charter of the city of Huron, the city of Huron did construct, and cause to be constructed, a system of waterworks, consisting of engine, boiler, pumps, watermains, pipes, hydrants, sewers, and all other appurtenances necessary to a complete system of waterworks, at a great expense, to wit, as informed and believed by the plaintiffs, to be the sum of forty thousand dollars; and to pay for said waterworks and sewer, said

city council issued the bonds of the city of Huron, for said forty thousand dollars, payable fifteen years after date, bearing interest at the rate of seven per cent per annum, having first been directed to issue said bonds by vote of the people, at an election duly called and held for that purpose, as provided by said charter. 4. That heretofore, and during the year 1886, the said city of Huron caused to be bored and constructed a large six-inch artesian well, as a part of an addition to the aforesaid system of waterworks, and, as informed and believed, at an expense of four thousand five hundred dollars." "6. That said city of Huron, from the year 1883 to July 21, 1890, through its city council, operated, controlled, and maintained said waterworks, and made all needful rules and regulations concerning the distribution and use of water supplied by said waterworks for the prevention and extinguishment of fires, and to supply the citizens and taxpayers at a moderate and reasonable rate in accordance with the provisions of section 7, subdivision 9, of the charter of said city." "8. That, at the time of the commission of the grievances hereinafter mentioned, said waterworks were owned by, and were of great value to, said city taxpayers of said city of Huron, amounting, as informed and believed by the plaintiffs, to at least one hundred thousand dollars." 12. That "the mayor and city council of said city of Huron, on or about the twenty-first day of July, 1890, did unlawfully and wrongfully, and in violation of the city charter and their high and legal duties and trust reposed in them by the taxpayers and corporators of the city of Huron, execute and deliver to the defendant, the Huron Waterworks Company, ¹⁷ a deed in terms conveying to said defendant, the Huron Waterworks Company, the entire valuable waterworks system of and belonging to the city of Huron, including all machinery, buildings, grounds, engines, boilers, watermains, hydrants, artesian well, pumps, and all property and effects of every description appertaining to said waterworks system, and placed the said defendants, the Huron Waterworks Company in full possession and control of the same, without the consent and to the great injury of the taxpayers and corporators of the city of Huron." The plaintiffs conclude with a prayer that the sale and conveyance might be declared null and void; that the officers of said city be enjoined from paying over to the Huron Waterworks Company the rents for the use of water for the city purposes contracted to be paid by the com-

mon council of the city and that the possession of said waterworks property be restored to the city.

The court, among others, found the following facts: "4. That the city of Huron made said conveyance in pursuance of an agreement to make the same, entered into on the sixteenth day of July, 1890, at which time ten thousand dollars was paid into the city treasury by the Dakota Farm Mortgage Company, for the use of said Huron Waterworks Company, and on the twenty-first day of July, 1890, the balance of thirty-five thousand dollars of the purchase price was paid into the city treasury by the Dakota Farm Mortgage Company for the use of said Huron Waterworks Company, and on that day the city executed said deed of conveyance, and delivered the same to said Huron Waterworks Company, and placed said company in possession of said waterworks." "7. That said waterworks plant was constructed and used by said city of Huron for the convenience of the citizens of the compact community embraced within the corporate limits of said city, for furnishing water to private consumers, for domestic and power purposes, and for the protection of said city and its inhabitants from the ravages of fire, and the same has at all times been used for those purposes, both by the city before the sale, and by said ¹⁸ waterworks company since said sale." "10. I find that neither the city, nor the taxpayers of the same, have ever paid or tendered back to the said waterworks company any part of the purchase price of the said waterworks, or any part of the sum paid out for the repairs or extensions of said waterworks system, and no effort has been made on the part of the city or taxpayers to place the waterworks company in the same condition as they were before the sale and delivery of said property."

The material facts in the action of Huron Waterworks Co. v. Huron are stated in the opinion delivered in that case on a former appeal, reported in 3 S. Dak. 610, and, it is sufficient to say, its object was to obtain an injunction against the officers of the city, restraining them from interfering with the waterworks property.

It will not be necessary to notice the numerous assignments of error, as we shall confine ourselves to the discussion of only two questions raised by the record, which are: 1. Did the common council of the city of Huron possess the power, unaided by state legislation, to sell and transfer the Huron waterworks

system to the Huron Waterworks Company, a private corporation? 2. If the city council did not possess the power to dispose of the waterworks property, can the city of Huron regain possession of the same, without refunding to the Huron Waterworks Company the money advanced or paid by it as consideration for the same?

The learned counsel for the appellants, the city of Huron, H. Ray Myers, and Henry Schaller contend: 1. That the waterworks system of the city of Huron, having been constructed, by virtue of a power conferred upon the city, at the expense of the corporation, became the property of the city, for public use, and was charged with a trust, and that the common council of said city, without the sanction of state legislation, did not possess the power to sell or dispose of the same; 2. That the waterworks system of the city of Huron, having been constructed, kept, and maintained for public purposes, namely for the supply of water ¹⁹ for the extinguishment of fires within the corporate limits of the city, and for the supply of the inhabitants of said city with pure and wholesome water for domestic purposes, was clothed with a public trust of which the inhabitants of said city were the beneficiaries, and the common council of said city could not, without the consent of the legislative power of the state, divest said city of the trust; 3. That the only power conferred upon the city of Huron by its charter was the power to "construct and maintain" waterworks for the city, and that the power to "construct and maintain" does not include the power to sell or dispose of the same; 4. That the attempted sale and transfer of the said waterworks by the mayor and common council was without authority and void, and that such sale being void, the city of Huron, in its corporate capacity, is entitled to the possession of said waterworks property, without refunding to the pretended purchasers, the Huron Waterworks Company, the amount paid by it as the consideration of said purchase.

The learned counsel for the respondents insists: "1. The city had power, under its charter, to dispose of this property, because it was erected for the private advantage of the people of the compact community of which the municipality was composed, and is not charged with any public trust for the general public; 2. That the property was not devoted to a different use from that for which it was erected, and the city had the power to contract with a private corporation, and for such purpose, and for its

maintenance, the location of the legal title is a matter of no concern whatever; 3. That even if the city has made a contract in excess of its powers, it cannot be relieved from the effects of such contract until it has placed the plaintiff in the same position as it was before the contract was entered into; 4. That if the city has exercised a power beyond its charter, only the state can complain of such action in an appropriate proceeding instituted by the state. . . . 6. The city, while it was authorized to, was not bound to maintain these waterworks, and the court cannot compel it nor its officers to do so. . . . 8. ²⁰ All the contracts and deeds, taken together, are only an appropriate means of carrying out the powers conferred upon the city. They are only an appropriate means of providing for the maintenance of the waterworks system and for extensions to the same."

The city of Huron was incorporated under a special charter, and there are only three sections called to our attention as bearing upon the question, which are as follows: Section 1 provides: "That the city of Huron . . . shall have power to make all contracts necessary to the exercise of its corporate powers, to purchase, hold, lease, transfer, and convey real and personal property for the use of the city . . . and to exercise all the rights and privileges pertaining to a municipal corporation." Section 7, part 8, provides as follows: "The city council shall have power . . . to organize and support fire companies, hook and ladder companies, and provide them with engines and all apparatus for extinguishment of fires, . . . to construct and furnish reservoirs, wells, cisterns, aqueducts, pumps, and other apparatus for protection against fires, and to establish regulations for the prevention and extinguishment of fires." Section 7, part 9, provides as follows: "The city council shall have power . . . to construct and maintain waterworks and make all needful rules and regulations concerning the distribution and use of water supplied by such waterworks."

The waterworks of said city, as found by the court, were constructed and used by said city of Huron for protection against fire and for domestic purposes, and it had been so maintained and used for a number of years prior to said alleged sale. They were constructed by the corporation and at the expense of the same. No express power to sell or convey said property has been conferred upon the mayor and common council of said city, nor upon the corporation itself, unless such power is included in the

powers conferred upon the city by section 1, which, as we have seen, provides "that the city of Huron . . . shall have power . . . to purchase, hold, lease, transfer, and convey real and personal ²¹ property for the use of the city, . . . and to exercise all the rights and privileges pertaining to a municipal corporation." The counsel for the respondents concedes that there is a class of property owned by a city that the common council of a city do not possess the power to sell, and he admits that public parks, squares, commons, cemeteries, etc., come within this class; but he insists that the waterworks of a city, though constructed by the city at the expense of the corporation, and used for protection against fire, and for the purposes of supplying pure and wholesome water to the citizens, do not belong to this class. It is necessary, therefore, to determine the nature and character of waterworks properly held by a city. The grounds upon which municipal corporations are denied the power to sell and convey the class of property above referred to are that such property is held by the corporation for public use, and is therefore charged with a public trust of which the corporation cannot divest itself, except by the express authority of the law-making power of the state.

The duties imposed upon municipal corporations for governmental purposes purely need not be considered, as it cannot be claimed that the exercise of the power to create and maintain city waterworks is strictly a governmental purpose, so far as it relates to the state at large. Neither are public squares, parks, wharves, cemeteries, landing places, fire apparatus, etc., held for governmental purposes, in the sense that they relate to the general public of the state; but they are governmental in the sense that they exist for public use—that is, for that portion of the public embraced within the limits of the city. This distinction is well stated by Judge Dillon in his work on Municipal Corporations. That learned author says: "As respects the usual and ordinary legislative and governmental powers conferred upon a municipality, the better to enable it to aid the state in properly governing that portion of its people residing within the municipality, such powers are in their very nature public, although embodied in a charter, and not conferred by laws general in their nature and applicable to the entire state. But powers or franchises of an exceptional ²² or extraordinary or nonmunicipal nature may be, and sometimes are, conferred upon municipalities,

such as are frequently conferred upon individuals or private corporations. Thus, for example, a city may be expressly authorized in its discretion to erect a public wharf, and charge tolls for its use, or to supply its inhabitants with water or gas, charging them therefor and making a profit thereby. In one sense, such powers are public in their nature, because conferred for the public advantage. In another sense, they may be considered private, because they are such as may be, and often are, conferred upon individuals and private corporations, and result in a special advantage or benefit to the municipality as distinct from the public at large. In this limited sense, and as forming a basis for the implied civil liability for damages caused by the negligent execution of such powers, it may be said that a municipality has a private as well as a public character. And so, as hereafter shown, a municipality may have property rights which are so far private in their nature that they are not held at the pleasure of the legislature": 1 Dillon on Municipal Corporations, sec. 27. While parks, squares, wharves, landing places, fire apparatus, etc., are not absolutely necessary, to enable a municipal corporation to perform its strictly governmental duties, so far as they relate to the state at large, they are so far held for governmental purposes that they cannot be appropriated to any other use without special legislation. Mr. Chief Justice Waite, in speaking of this class of city property in *Meriwether v. Garrett*, 102 U. S. 473, says: "1. Property held for public uses, such as public buildings, streets, squares, parks, promenades, wharves, landing places, fire engines, hose and hose carriages, engine houses, engineering instruments, and, generally, everything held for governmental purposes, cannot be subjected to the payment of the debts of the city. Its public character forbids such an appropriation." And Mr. Justice Field, in the same case (page 513) says: "What, then, is the property of a municipal corporation, which, upon its dissolution, a court of equity will lay hold of and apply to the payment of its debts? We answer: 1. That it is not property²³ held by the corporation in trust for a private charity, for in such property the corporation possesses no interest for its own uses; and 2. That it is not property held in trust for the public, for of such property the corporation is the mere agent of the state. In its streets, wharves, cemeteries, hospitals, courthouses, and other public buildings, the corporation has no proprietary rights distinct from the trust for the public. It holds them for public

use, and to no other use can they be appropriated without special legislative sanction. It would be a perversion of that trust to apply them to other uses."

It is difficult to perceive upon what principle a distinction can be made between the waterworks of a city, constructed at the expense of the corporation and used to supply water for fire purposes, domestic use, and other city purposes, and public parks, squares, fire apparatus, public buildings, etc., used for public purposes, and the courts in the latter decisions seem to make no such distinction. Judge Dillon, in his work above referred to, says: "In some of the states, it is held that the private property of municipal corporations—that is, such as they own for profit, and charged with no public trusts or uses—may be sold on execution against them. . . . On principle, in the absence of statutable provision, or legislative policy in the particular state, it would seem to be a sound view to hold that the right to contract and the power to be sued give to the creditor a right to recover judgment, that judgments should be enforceable by execution against the strictly private property of the corporation, but not against any property owned or used by the corporation for public purposes, such as buildings, hospitals, and cemeteries, fire engines and apparatus, waterworks, and the like; and that judgments should not be deemed liens upon real property, except when it may be taken in execution": Dillon on Municipal Corporations, sec. 576. It will be noticed that Judge Dillon places waterworks in the same class with public buildings, hospitals, cemeteries, etc., and in this the learned author is fully supported by the very able decision of the supreme court of the United States in *New Orleans v. Morris*, 105 U. S. 600. Mr. Justice ²⁴ Miller, speaking for the court says: "The learned counsel, in the oral argument and in the brief, substantially concedes that the waterworks themselves, in the hands of the city, were not liable to be sold for the debts of the city. And, if no such concession were made, we think it quite clear that these works were of a character which, like the wharves owned by the city, were of such public utility and necessity that they were held in trust for the use of the citizens. In this respect they were the same as public parks and buildings, and were not liable to sale under execution for ordinary debts against the city. . . . In the next place, the city was not situated, as regards this property, as a private person would be in the purchase and acquisition of ordinary property. The city could not have sold this property as

the law stood. It could not have put it into a joint stock company without the aid of a new law. The legislature, in authorizing the change in the form of the ownership of the waterworks, could, since it injured nobody and invaded no one's rights, say, as to the city, whether it be called new property or not, that such ownership could continue exempt from execution. As the city was using no means in acquiring this stock which could have been appropriated under any circumstances to the payment of the debts of the appellees, the legislature impaired no obligation of the city in declaring the stock thus acquired exempt from liability for debts." This decision is important, not only as being made by the highest court of the nation, but as being the unanimous opinion of that court upon the question, and made subsequently to the decision in the Meriwether case above cited. It is clear and to the point that the waterworks of a city belong to the same class of property as "wharves, parks," etc., and holds distinctly that the waterworks property of a city cannot be sold, except by authority of the legislature, and the court says: "We think it quite clear that these works were of a character which, like the wharves owned by the city, were of such public utility that they were held in trust for the use of the citizens." The same view is taken by the court of appeals in the state of New York in the case of Rochester ²⁵ v. Rush, 80 N. Y. 302. In that case the court says: "The argument of the appellant that the property in question would properly be exempt from a city tax, as it was procured by a tax upon property within the city, but not from a county tax, but the people of the county were not taxed to procure it, would apply with equal force to the city hall and engine houses and machines and equipments which make those houses necessary, and, if sound, would subject them to the hazard of sale under a treasurer's warrant for the enforcement of a county tax. I am unable to perceive that in any sense the waterworks can be regarded as the private property of the city, as distinguished from property held by it for public use. These considerations lead to the opinion that the property was not taxable, and that the proceedings on the part of the assessors of the town of Rush in regard thereto cannot be sustained."

The supreme court of Connecticut, in the well-considered case of West Hartford v. Board of Water Commrs., 44 Conn. 360, lays down the same doctrine. In that case, the court says: "The introduction of a supply of water for the preservation of the

health of its inhabitants by the city of Hartford is unquestionably now to be accepted as an undertaking for the public good, in the judicial sense of that term; not indeed as the discharge of one of the few governmental duties imposed upon it, but as ranking next in order. For this purpose the legislature invested the city with a portion of its sovereignty, and authorized it to enter within the territorial limits of West Hartford, and condemn by process of law certain lands therein for the purpose of storing water for its own inhabitants. It authorized the assessment of a tax upon property within the city of Hartford for money wherewith to pay for this land, because the taking and holding was for the public good." Having, as we think, established the proposition, that the waterworks of a city, when constructed and owned by the city, are to be regarded the same as other city property held for public use, and therefore charged and clothed with a public trust, it would seem to follow that such property cannot be sold ^{as} and conveyed by the mayor and common council of the city, unless under special authority conferred upon them to so sell and convey the same, by the legislative power of the state. Judge Dillon says, in his work before referred to, that they (municipal corporations) cannot dispose of property of a public nature, in violation of the trusts upon which it is held, and they cannot, except under valid legislative authority, dispose of the public squares, streets, or commons: See 2 Dillon on Municipal Corporations, sec. 575, and cases cited. In the recent case of *Roberts v. Louisville*, 92 Ky. 95, the same doctrine was laid down by the supreme court of Kentucky as to the wharves held by the city of Louisville. In that case the court says: "The power of a municipal corporation to acquire land for the purpose of erecting wharves thereon, and to charge wharfage, is not a necessary incident of its charter, but must, like all its other powers, be derived directly from the legislature, of course to be exercised within the limits and upon conditions of the grant: Dillon on Municipal Corporations, sec. 110. And, looking to the nature and purpose of such special grant, it must be regarded as a trust, involving duties and obligations to the public and individuals which cannot be ignored or shifted; for the power to acquire implies the duty of the municipality, through its governing head, to maintain and preserve wharf property for the benefit of the public, without discrimination or unreasonable charges for individual use. In every instance, so

far as we have observed, wharf property of the city of Louisville has been acquired under act of the legislature, and paid for by taxation; and in no case is there evidence of legislative intention it should be held otherwise than in trust for use of the public, and in aid of trade and commerce. The wharf property being so held, the city of Louisville cannot transfer its title or possession, nor, according to a plain and well-settled principle, can the general council, which is by statute invested with power of control, and burdened with the duty of maintaining, preserving, and operating the wharves, either delegate the power or disable itself from performing the duties." In that case the judgment of the court below ²⁷ dismissing the bill for an injunction was reversed, the court, in effect, holding that an injunction enjoining the mayor and common council from making the sale should be granted. In the case of *Smith v. Mayor*, 88 Tenn. 464, also a late decision made in 1890, the supreme court of Tennessee says: "It is seen at once that the waterworks are a corporate property. That is not denied. The debate is with respect to the nature of the use. As to that, for the sake of convenience, we divide all the purposes for which the city furnishes water into three classes: 1. To extinguish fires and sprinkling the streets; 2. To supply citizens of the city; 3. To supplying persons and factories adjacent to but beyond the corporate limits. If the business were confined to the first class, there would be no ground to base a decision on, so clearly would the use be exclusively for public advantage. We think there can be but little more doubt about the second class, especially in view of certain words in the city charter, to which we will advert presently. . . . Having accepted the charter, and undertaken to exercise this authority in the manner detailed by the witness, it cannot be held that the city in doing so is engaging in a private enterprise, or performing a municipal function for a private end. It is the use of corporate property for corporate purposes, in the sense of the revenue law of 1877. It can make no difference whether the water be furnished the inhabitants as a gratuity or for a recompense, the sum raised in the latter case being reasonable, and applied for legitimate purposes."

From this examination of the authorities, we conclude that there is no distinction between the nature of waterworks property owned and held by the city, and public parks, squares, wharves, quarries, hospitals, cemeteries, city halls, courthouses,

fire engines, and apparatus, and other property owned and held by the city for public use. All such property is held by the municipality as a trustee in trust for the use and benefit of the citizens of the municipality, and it cannot be sold or disposed of by the common council of the city, except under the authority of the state legislature. ²⁸ Such property, as before stated, is private property, in the sense that the municipality cannot be deprived of it without compensation, no more than can a private corporation be deprived of its property by the law-making power. But such property is so owned and held by the municipality as the trustee of the citizens of the municipality, for the use and benefit of such citizens. It has been acquired by the corporation at the expense of the taxpayers of the city, for their use and benefit, and the law will not permit the corporation to divest itself of the trust, nor to deprive the citizens of their just rights as beneficiaries in the same.

Counsel for respondents has called our attention to a number of cases which he contends hold a contrary doctrine from those to which we have directed attention. But, after a careful examination of those authorities, we are inclined to the opinion that there is no such conflict as the counsel suggests. The leading case cited is *Bailey v. Mayor*, 3 Hill, 538, 38 Am. Dec. 669, in which Chief Justice Nelson, in the course of the opinion, uses language, taken by itself, that possibly might be construed as favorable to the respondents' contention, but it must be construed with reference to the case before the court. The questions we are now considering were not involved, the only question there being whether or not the city of New York was liable for damages caused by a defective dam erected in the construction of its water system. The views expressed by the chief justice in that case have been repudiated by the courts of New York. In *Darlington v. Mayor*, 31 N. Y. 164, 88 Am. Dec. 248, the court of appeals expressly disapprove of the doctrine announced by Chief Justice Nelson. That court says: "If this case of *Bailey v. Mayor*, 3 Hill, 528, 38 Am. Dec. 669, had rested where it was left by the supreme court, though I should be obliged to acknowledge my inability to appreciate the distinction suggested between the public and private functions of the city government, the judgment would have been entitled to a certain weight as authority. But a new trial took place, pursuant to the judgment of the supreme court, when the plaintiff

recovered a very large verdict, and the case was presented to the court for the correction of ²⁹ errors, whose judgment of affirmance is reported in *Mayor, etc. v. Bailey*, 2 Denio, 433. The chancellor and three senators delivered written opinions in favor of affirmance, and the president of the senate an opinion for reversal. None of the opinions even alluded to the ground taken in the opinion of the supreme court. . . . The liability of the defendants being established by the court of ultimate review, on an entirely different theory from that which affirmed the enterprise of conveying water into the city to be a private work, as distinguished from an act of municipal government, the doctrine of the opinion of the supreme court was substantially repudiated, and cannot, therefore, be considered as a precedent. It is but the opinion of the eminent chief justice and learned associates, and does not, like a final adjudication upon the cause of action, settle any principle of law." And that court, speaking of the question now before us, says: "The subjects of the several actions, in the cases I have been examining, were as clearly matters of municipal government as any which could be presented. Nothing could, in the nature of things, partake less of a private character than the supplying of water to and the cleaning of the streets of a town containing nearly a million of inhabitants. If these were not public subjects, and under the control of the legislature, the city is not subordinate to the supreme legislative power on any conceivable subject. It is an imperium in imperio." We have already seen that in the case of *Rochester v. Rush*, 80 N. Y. 302, the court of appeals of New York distinctly placed waterworks in the class of property held for public use, and therefore exempt from taxation. Georgia held that the common council of the city of Rome had power to mortgage the waterworks for money advanced for its construction. The court in that case was construing a charter in which the powers conferred upon the common council of the city of Rome were exceedingly broad and comprehensive—much more so than those conferred upon the city of Huron as a corporation—and they were conferred directly upon the common council itself. The decision is one of too local a character and too dependent upon the provisions of the ³⁰ charter to be of much weight, and so it seems to have been regarded, as it is rarely referred to by the courts; and Judge Dillon, in citing the decision, adds: "Query, as to implied power to mortgage waterworks, see *supra*,

section 576, and note 577"—thus indicating that that learned author does not regard the doctrine of the court as sound in principle. The case of *Adams v. Memphis etc. R. R. Co.*, 2 Cold. 645, involved the sale, by the common council of the city, of some outlying lands donated to the city. The land had not been devoted to any public use, and was not held by the city in trust for public purposes. It was, therefore, strictly private property of the city, held like the private property of a natural person or private corporation. The decision in that case, therefore, has no application to the case at bar. The doctrine laid down in the case of *Western Sav. Fund Soc. v. Philadelphia*, 31 Pa. St. 175, 72 Am. Dec. 730, does not seem to be applicable to this case. The contest there was between the city and a private gas company in which the city held stock. The case is somewhat complicated, and it is not easy to determine the question actually decided by the court. There is language used by the judge writing the opinion that cannot be sustained in the light of more modern authority, but we discover nothing in the decision itself that is in conflict with the doctrine that waterworks, when constructed and owned by the city, are held for public use, and therefore charged with a public trust. Our conclusion is, that the waterworks in controversy were held by the city of Huron for public use, and therefore charged and clothed with a public trust, and that the mayor and common council of the city had no authority to sell and transfer the same. "Municipal corporations are created and exist for the public advantage, and not for the benefit of the officers or of particular individuals or classes. The corporation is the artificial body created by the law, and not the officers, since these are, from the lowest up to the council or mayor, the mere ministers of the corporation": 1 Dillon on Municipal Corporations, sec. 21.

The common council of the city of Huron was, to a certain extent, at least, but agent of the corporation, and possessed only ²¹ such authority as was conferred upon it by its charter. While it probably possessed the power of disposing of strictly private property held by the city, and not held for public use, and therefore not charged with a trust, it did not possess the power to dispose of the city waterworks constructed by the corporation, and held for public use; and the power conferred by the first section of its charter to sell and dispose of the property of the

city must be held to be limited to that class of property held as strictly private property, and not charged with any public use.

Having arrived at the conclusion that the sale of the waterworks by the city council was made without authority, and was void, it becomes necessary to determine the second question presented, namely, Is the city of Huron entitled to the possession of the waterworks property without refunding to the Huron Waterworks Company the money paid by it to the city treasurer as the consideration therefor, and the money expended by said company in making improvements and repairs thereon? It will be noticed from the findings of fact in reference to the payment of the consideration, that it was paid to the city treasurer, or "into the city treasury." It is not found that the treasurer paid out the same by the order of the common council, upon any legitimate or other indebtedness of the city, or that he has appropriated it to any city purpose whatever. The act of the city treasurer in receiving the money cannot bind the city to refund it. As city treasurer, his only authority is to receive and receipt for moneys properly due the city, or that are legally paid into the city treasury. The money paid for this waterworks property did not belong to the city, and the money was therefore paid to one who had no authority, as treasurer or agent of the city, to receive it in the name of the city and apply it in the payment of city indebtedness. The money in the hands of the treasurer did not belong to the city, and there being no finding that the city, in its corporate capacity, accepted and appropriated the money, the city is not liable to refund the same. This subject was very fully considered and discussed in *Herzo v. San Francisco*, 33 Cal. 134. That was an action brought to recover of the city money paid by the plaintiff for "city slip property," the sale of which by the city had been held illegal and void. The supreme court in that case held that the plaintiff could not recover, as he had failed to show, and the court below had failed to find, that the corporation in its corporate capacity had appropriated the money paid, although it was shown that the money paid for the property had been paid into the city treasury and paid out by the treasurer on city indebtedness. The court in that case, on page 147, says: "The city, in our opinion, not being responsible for the acts of her assumed agents up to and including the placing of the money in the treasury, and the money being then the money of the plaintiff, responsibility for the money does not at-

tach to her till she has converted it to her own use. The unauthorized act of the treasurer in paying it out to a third person is not the act of the city, and it makes no difference in this respect whether he pays it to a creditor of the city or to any other person. Suppose that he or the secretary of the land committee, while the money was in his hands, acting upon the fact, of which all persons concerned had notice, that the sale was a nullity, had returned the money to the plaintiff, it could not be said that the act of payment was the act of the city. She could not rightfully do anything with the money, and, to be responsible for it, she must have wrongfully converted it to her own use, and this she must have done by some corporate act, and the only act competent for that purpose was an appropriation, for that is the only manner in which she can dispose of money. The reports of the secretary of the land committee and of the treasurer, and the acceptance of the reports by the common council, neither changed the ownership, the custody, nor control of the money—it still remained in the hands of the treasurer, and continued the property of the plaintiff.”

In the case of *Pimental v. San Francisco*, 21. Cal. 357, one of the same class of “city slip cases” above referred to, the plaintiff was held entitled to recover back the money paid; but ²² upon the ground that it was shown, not only to have been received by the city treasurer, but appropriated by the corporate authority of the city, by ordinances and resolutions. In that case Chief Justice Field, speaking for the court, on page 361, says: “The moneys paid by the bidders went into the treasury of the city, and were afterward, by different ordinances and resolutions, appropriated to municipal purposes. To the different actions, as we have mentioned, various defenses have been interposed. In some of them, as already stated, the entire transactions giving rise to or connected with the alleged sale have been treated as transactions to which the city was an absolute stranger; in other words, a want of privity, as it is termed, between the bidders and the city has been alleged. This alleged want of privity, as we understand it, amounts to this: That inasmuch as the mayor and land committee had no authority to make the sale, they had no authority to pay the money which they had received from the bidders into the treasury of the city, and therefore no obligation can be fastened from such unauthorized act upon the city. The position thus restricted in its statement is undoubtedly correct,

but the facts of the cases go beyond this statement. They show an appropriation of the proceeds, and the liability of the city arises from the use of the moneys, or her refusal to refund them after their receipt." The same doctrine is laid down in *Agawam Nat. Bank v. South Hadley*, 128 Mass. 503. In that case the court says: "But the plaintiff contends that it is entitled to recover upon the last count in the declaration for money had and received, and at the trial offered to show that the money paid or credited to the town treasurer upon the notes in suit was used by him in the payment of debts due from the town. This evidence was properly rejected. It fails to show that the money was received by the town in its corporate capacity, or that the act of the treasurer in applying it to the payment of its debts was ever authorized or ratified by the town. The difficulty is, that the money was paid to one who had no authority as treasurer or as agent of the town to receive it in the ²⁴ name of the town, and apply it to the payment of town debts. If a town could be held, in an action for money had and received, under such circumstances, then the purpose of the second and third sections of the statute would be wholly defeated. It makes no difference that the treasurer used this specific money in payment of the town debts. There is nothing to show any appropriation of such payments by the town to its own use, or any ratification of the act. The money in the hands of the treasurer did not belong to the town": *Litchfield v. Ballou*, 114 U. S. 190. It would be manifestly unjust and inequitable to require the city of Huron to refund the consideration paid for these waterworks, before it can be restored to the possession of the same, because the same was paid to and received by an officer of the city unauthorized to receive it. If it had been further found by the court in this case that the city of Huron, through its proper corporate authorities, had appropriated the money so paid to the payment of the legitimate debts of the city, another question might have arisen; not necessary now to consider. But it is clear that, upon principle and authority, upon the findings in this case, the conclusions of law and the judgment should have been in favor of the city of Huron, H. Ray Myers, and Henry Schaller. The circuit court, in arriving at a different conclusion, in our opinion, committed error.

The judgments of the court below are reversed, and the case remanded, with instructions to the circuit court to correct its

conclusions of law in accordance with this opinion, and render the proper judgments in favor of the city of Huron, H. Ray Myers, and Henry Schaller, as prayed for in their complaint, and against the Huron Waterworks Company, and it is so ordered, all the judges concurring.

MUNICIPAL CORPORATIONS—ALIENATION OF PROPERTY.

A municipal corporation possesses implied power to alienate or dispose of its property, real or personal, of a private nature, unless restrained by charter or statute, but it cannot dispose of property of a public nature in violation of the trusts upon which it is held: *Fort Wayne v. Lake Shore etc. Ry. Co.*, 132 Ind. 558; 82 Am. St. Rep. 277. Property owned by a municipal corporation is public property, and is under the control of the legislature: *Darlington v. Mayor etc. of New York*, 31 N. Y. 164; 88 Am. Dec. 248. Compare monographic note to *Mount Hope Cemetery v. Boston*, 35 Am. St. Rep. 529-540, on legislative control over the property of municipalities.

MUNICIPAL CORPORATIONS—AVOIDANCE OF CONTRACT—PLACING IN STATU QUO.—As to when one party will be required to do equity to the other where one of them, a municipal corporation, has entered into a contract with the other, which is void, in whole or in part because of a want of power on the part of the corporation to make it, see *Brown v. Atchison*, 39 Kan. 37; 7 Am. St. Rep. 515.

MUNICIPAL CORPORATIONS—LIABILITY FOR ACTS OF OFFICERS.—A city is not answerable for the unauthorized acts of its officers, though done *colore officii*. It must further appear that they were expressly authorized to do the acts by the city government, or that they were done *bona fide* in pursuance of a general authority to act for the city on the subject to which they relate; or that, in either case, the act was adopted and ratified by the corporation: See monographic notes to *Hillsdorf v. St. Louis*, 100 Am. Dec. 358, on the liability of a city for the unauthorized acts of its officers, and *Goddard v. Harpswell*, 30 Am. St. Rep. 370-413, on the liability of cities for the negligence and other misconduct of their officers and agents.

CLARK v. DARLINGTON.

[7 SOUTH DAKOTA, 148.]

CLOUD ON TITLE—ACTION TO QUIET TITLE—TAX SALE CLAIMANT AS DEFENDANT.—Under a statute authorizing any person to bring an action "against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim," the holder of a certificate of purchase of land at a tax sale, which entitles him to a deed of such land at the maturity of the certificate, claims such "an estate or interest" in the land as will support an action against him to quiet title.

CLOUD ON TITLE—ACTION TO QUIET TITLE—COMPLAINT AGAINST TAX SALE CLAIMANT—CAUSE OF ACTION.—A complaint under a statute authorizing any person to bring an action "against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim," states a cause of action where it alleges that the plain-

tiff is the absolute and unqualified owner in fee simple; that the defendant, wrongfully and without right, claims an interest in the land described by virtue of an alleged purchase thereof at a tax sale; that said claim is unjust and wrongful, and without any foundation in law or fact, and that said claim is made adversely to the ownership and title of the plaintiff; although it does not particularly set out the facts upon which the invalidity of the tax sale and certificate is claimed.

**CLOUD ON TITLE—ACTION TO QUIET TITLE—COMPLAINT AGAINST TAX SALE CLAIMANT—GENERAL DEMUR-
RER.**—If the owner of land brings an action to quiet title against one who claims an interest in the land by virtue of an alleged purchase thereof at a tax sale, and it does not appear upon the face of the complaint, either expressly or by implication of law or fact, that any taxes were or are due upon the land, the complaint is not subject to a general demurrer on the ground that it does not contain an offer to pay whatever taxes may be justly found due on the land.

Action to quiet title. A demurrer to the complaint was overruled, and the defendant appealed.

Albert Gunderson, for the appellant.

H. C. Briggs and H. H. Potter, for the respondent.

149 KELLAM, J. This is an appeal from an order of the circuit court of Edmunds county overruling a demurrer to the complaint. Respondent brought the action to quiet the title to certain real estate in the complaint described. It is alleged: 1. That plaintiff "is the absolute and unqualified owner in fee simple" of the land described; and 2. That the defendant "wrongfully and without right claims an interest in said land by virtue of an alleged purchase thereof at tax sale; that said claim is unjust and wrongful, and without any foundation in fact or law; that said claim is made adversely to said ownership and title of said plaintiff." To this complaint defendant demurred, on the ground that it does not state facts sufficient to constitute a cause of action. From an order overruling the demurrer the defendant appeals.

Appellant contends that section 5449 of the Compiled Laws, under which this action is brought, does not authorize an action to quiet title against one who does not claim "an estate or interest in real ¹⁵⁰ property" adverse to the plaintiff, and that, as one who "claims an interest in said land by virtue of an alleged purchase thereof at tax sale" has a lien only, he is not in position to maintain an action under said section. The section reads as follows: "An action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim."

This view of the scope of this statute is apparently sustained by *Bidwell v. Webb*, 10 Minn. 59, 88 Am. Dec. 56, in which it is held that a purchaser at a tax sale has no such "estate or interest" in the real estate so sold as would subject him to an action under this section. This seems to us to narrowly restrict the meaning of the word "interest" as used in that section. The evident purpose of the statute was to authorize one claiming to be the owner of real estate to himself initiate proceedings to test the validity of an adverse claim of "estate or interest" in such real estate asserted by another; to have the same canceled if unfounded, and thus relieve himself from the annoyance, and his property from the damaging and depreciating effect, of the constant and standing assertion and menace of such unfounded claim. He is not obliged to "suffer in silence" until such time as the adverse claimant shall see fit to formally and actively predicate judicial or other proceedings upon his claim. In this case, the allegation is, in substance, that the property was unlawfully sold for taxes, and that the defendant is the holder of the sale certificate. This certificate will, of itself, and by mere efflux of time, grow into a deed, which will purport, at least, to convey the title. Such outstanding tax sale certificate injures and depreciates the owner's title in the same manner, though probably not in the same measure, as the tax deed which will be based upon it; and there would appear to be no good reason why such certificate, if invalid and wrongful, should be required to ripen into a deed before the owner of the fee could attack it. In *Eaton v. Supervisors*, 44 Wis. 490, and again in *Horn v. Garry*, 49 Wis. 470, it was held that such a certificate did give the holder an interest in the real estate; that it was a certificate of the purchase of the land ¹⁵¹ described, subject to be defeated by redemption. We think the holder of such instrument ought to be regarded as claiming an interest in the land within the meaning of the statute quoted. This was distinctly so held in *Axtell v. Gerlach*, 67 Cal. 483, a case very similar to the one now before us as to facts. *Kittle v. Bellegarde*, 86 Cal. 556, was an action by one claiming to be the owner of real estate against one holding a certificate of sale for unpaid assessments for street improvements. The court held the action properly brought under the section of their statute corresponding with our section 5449. See, also, *Withers v. Jacks*, 79 Cal. 297, 12 Am. St. Rep. 143, where it is said that this statute is intended to embrace every

description of claim whereby the plaintiff might be deprived of his property, or its title clouded, or its value depreciated, and *Maxon v. Ayers*, 28 Wis. 612; *Bogert v. Elizabeth*, 27 N. J. Eq. 568; *Rhea v. Dick*, 34 Ohio St. 420. While the statutes of some of these states are not phrased precisely like ours, it is believed they were intended to apply to and afford relief in the same class of cases.

Appellant further contends that the complaint is demurrable because it does not set out the facts upon which the invalidity of the tax sale and certificate is claimed. This precise question has been ruled upon in several cases, and a complaint like this held sufficient. *Ely v. New Mexico etc. R. R. Co.*, 129 U. S. 291, went up from Arizona. The question and conditions were entirely like those now before us. The court said: "An allegation that the defendant claims an adverse estate or interest is sufficient, without further defining it, to put him to a disclaimer, or to allegation and proof of the estate or interest which he claims, the nature of which must be known to him and may not be known to the plaintiff." To the same effect, see *Amter v. Conlon*, 3 Colo. App. 185; *Jeffersonville etc. R. R. Co. v. Oyler*, 60 Ind. 383; *Scorpion etc. Min. Co. v. Marsano*, 10 Nev. 370, overruling a prior contrary holding in *Blasdel v. Williams*, 9 Nev. 161. *McDonald v. Early*, 15 Neb. 63, seems to hold a different view, but even under that authority the complaint in this case would not necessarily be bad, for it does ¹⁵² set out "the nature, character, and extent" of the defendant's adverse claim, so avoiding the objection made by the Nebraska court to the complaint in that case. Nor was it necessary, in our opinion, for the complainant in this action to plead an offer to pay whatever tax might be just and proper against the land. The complaint alleges that the sale was wrongful and void, and that defendant's claim is without foundation in fact or law. If, upon the trial, it should appear that the land is rightly and justly subject to some tax, the judgment of the court can provide for its payment as a condition of relief, but the complaint does not show upon its face that the facts stated are insufficient to constitute a cause of action.

The order of the circuit court overruling the demurrer is affirmed.

CLOUD ON TITLE.—A TAX TITLE is a cloud on title, and may be removed: *Notes to Polk v. Rose*, 89 Am. Dec. 778; *Helden v. Hellen*, 45 Am. St. Rep. 377. Suits to remove clouds from titles must not,

however, be confounded with actions to determine adverse claims under statutes authorizing such determination: See monographic note to *Scott v. Onderdonk*, 67 Am. Dec. 112, on bills to remove clouds on title.

McCORMICK HARVESTING MACHINE COMPANY v. FAULKNER.

[7 SOUTH DAKOTA, 362.]

NEGOTIABLE INSTRUMENTS—DELIVERY ACCORDING TO PURPOSE.—As a general rule, a negotiable promissory note, like any other written instrument, has no legal inception or valid existence as such until it has been delivered in accordance with the purpose and intention of the parties.

NEGOTIABLE INSTRUMENTS—EVIDENCE THAT CONDITION HAS NOT BEEN COMPLIED WITH.—Evidence is admissible, in an action on a negotiable promissory note signed by one person only, that the instrument was not to become operative as a note until another person also signed it; and evidence that such condition has not been complied with does not violate the rule that parol evidence is inadmissible to contradict or vary the terms of a written instrument.

NEGOTIABLE INSTRUMENTS—INVALIDITY OF, WHERE CONDITION HAS NOT BEEN PERFORMED.—If a person delivers his promissory note to another upon the express condition that the instrument shall not become operative as a note until it has been signed by a third person as comaker, no recovery can be had thereon, by the payee, until the condition as to the comaker has been performed.

TRIAL—WHEN VERDICT MAY BE DIRECTED.—If the evidence leaves the facts undisputed, and different conclusions or inferences are not deducible therefrom, the court should declare their legal effect. Hence, if only one conclusion or inference can be reasonably drawn, the court commits no error in directing a verdict.

Action on promissory notes. There was a judgment for the defendant, and the plaintiff appealed.

Frank Turner, for the appellant.

J. A. Pickler and D. H. Latham, for the respondent.

³⁶⁴ **CORSON, P. J.** This was an action upon two promissory notes executed by the defendant. The defendant, in his answer, admits that he executed the instruments, but alleges as a defense that the notes were not executed and delivered to said plaintiff as promissory notes; alleges that said plaintiff promised and agreed with the defendant, at the time of the delivery of said pretended notes, that said instruments would not be used as promissory notes against defendant, unless the said plaintiff also secured the signature of ³⁶⁵ one George Smith to said in-

struments, and then said instruments were to be the joint promissory notes of said defendant and of said George Smith; alleges that Smith's signature was not obtained, and that the plaintiff wrongfully and fraudulently diverted said alleged notes from the purpose for which they were given, and fraudulently misapplied the same by issuing and holding said notes against the defendant as his sole promissory notes. On the trial, the counsel for plaintiff objected to the evidence offered to sustain the defense, upon the grounds hereinafter stated. The evidence was admitted, and at the close of the trial the court directed a verdict for the defendant.

Two questions are therefore presented: 1. Was the evidence offered properly admitted? 2. Did the court commit error in directing the verdict? The evidence and objections material to the questions under consideration are as follows: "William G. Faulkner, having been called and sworn on his own behalf, testified as follows: . . . Q. You may state to the jury under what circumstances and conditions those notes were signed. State fully the facts in the case. (Objected to as incompetent and irrelevant; that they are seeking to offer parol testimony to vary the terms of a written agreement; and plaintiff further objects upon the grounds that the answer of the defendant does not state facts sufficient to constitute a defense to this action. Objection overruled. Excepted.) A. Well, this agent came to me in the field; with these notes, and wanted me to sign them. I didn't want to sign the notes. I wanted to know where Smith was, and he said he was going direct to Smith, and he produced a mortgage at the same time. I signed a note at the same time I signed the mortgage, and I signed those papers with the understanding that they would not be notes until George Smith signed them, and he was going direct from me to where George Smith was. I was in the field working when he came there. I objected to signing them, but he had the mortgage and the note, and he seemed to be interested in getting George Smith on the note, and I put them in his hands to get George Smith to sign them before they should be ^{see} delivered as notes, and then I signed them, and he went on as if he was going to Smith's." It was further shown that the machinery for which the notes were given was purchased by the defendant and said George Smith jointly. And it further appeared that the chattel mortgage referred to in the evidence was made out in the names of the defendant and the said George Smith, as the mortgagees, and was signed

by the defendant, but not signed by Smith. We are of the opinion that the answer stated a good defense, and that the evidence under it was properly admitted. While the first part of the answer seems to indicate that the plaintiff's agent only agreed to procure the signature of Smith to the notes, yet, taking the whole answer together, and giving to it a liberal construction, as we are required to do when objection is taken to it on the trial and not by demurrer, it is quite clear that the answer in effect states that the notes were delivered to the plaintiff, to be in force only as promissory notes in case they should be signed by Smith. In other words, the notes were not to be used or become operative as the notes of the defendant unless so signed by Smith: *Jenkinson v. Vermillion*, 3 S. Dak. 238; *Johnson v. Burnside*, 3 S. Dak. 230. The rule is well settled that parol evidence is inadmissible to vary or contradict the terms of a written instrument, as between the parties thereto, in the absence of fraud or mistake: *Jewett v. Sundback*, 5 S. Dak. 111; *Washabaugh v. Hall*, 4 S. Dak. 168; *Black Hills Nat. Bank v. Kellogg*, 4 S. Dak. 312. But the evidence in this case did not tend to contradict or vary the terms of the written instruments, but tended to prove that the so-called promissory notes were never in fact delivered as such, and therefore never took effect or became operative as promissory notes. As a general rule, a negotiable promissory note, like any other written instrument, has no legal inception or valid existence as such until it has been delivered in accordance with the purpose and intention of the parties: *Burson v. Huntington*, 21 Mich. 415; 4 Am. Rep. 497; *Whitaker v. Salisbury*, 15 Pick. 534; *Pawling v. United States*, 4 Cranch, 219; *Wilson v. Powers*, 131 Mass. 539; *Ware v. Allen*, 128 U. S. 590.

³⁶⁷ The rule applicable to this class of cases is very clearly stated by the supreme court of the United States in the case last cited. In that case the defendants Allen, West, and Bush had executed and delivered to W. P. Ware, the plaintiff and payee, a promissory note for ten thousand dollars, but upon the express condition that it was to be of no effect unless certain counsel named should assure the defendants that the proceedings which constituted the consideration for the note were valid. The counsel referred to held the proceedings invalid, and hence the defense set up. The court, speaking through Mr. Justice Miller, says: "We are of the opinion that this evidence shows that the contract upon which this suit was brought never went into

effect; that the condition upon which it was to become operative never occurred; and that it is not a question of contradicting or varying a written instrument by parol testimony, but that it is one of that class of cases, well recognized in the law, by which an instrument, whether delivered to a third person as an escrow or to the obligee in it, is made to depend, as to its going into operation, upon events to occur or to be ascertained thereafter." In *Pym v. Campbell*, 6 El. & B. 370, cited in the opinion just referred to, the learned English judge, in his opinion, says: "The distinction in point of law is, that evidence to vary the terms of an agreement in writing is not admissible, but evidence to show that there is not an agreement at all is admissible." In *Wilson v. Powers*, 131 Mass. 539, the supreme court of Massachusetts thus lays down the rule: "The manual delivery of an instrument may always be proved to have been on a condition which has not been fulfilled, in order to avoid its effect. This is not to show any modification or alteration of the written agreement, but that it never became operative, and that its obligation never commenced": See, also, as bearing on this question, *Cline v. Guthrie*, 42 Ind. 227; 13 Am. Rep. 357; *Chipman v. Tucker*, 38 Wis. 43; 20 Am. Rep. 1; *Roberts v. McGrath*, 38 Wis. 52. We are of the opinion that the evidence objected to was admissible, and that the evidence, uncontradicted, entitled the defendant to a judgment in his favor. The evidence clearly shows that the defendant did not ~~see~~ execute or deliver the notes, or intend to so execute or deliver them, as his individual notes, and that the instruments signed by him, and purporting to be promissory notes, were only to become operative when executed by Smith also; and, until so executed by said Smith, they were not delivered nor to take effect as promissory notes.

The learned counsel for appellant contends that the transaction only amounts to an agreement on the part of plaintiff's agent that he would get Smith to sign these notes, and that his failure to comply with his agreement cannot release the defendant from liability. But such is not the view we take of the evidence. In our opinion, the evidence shows that the defendant placed the notes in the hands of the agent to become operative only when executed by Smith, and upon the condition that unless they should be so executed by him they were not to be used as notes against defendant. As Smith never executed the notes, they, therefore, never became operative or took effect as against the defendant as promissory notes.

Did the court err in directing a verdict for defendant? As there was no conflict in the evidence, and it was clearly sufficient to sustain the defendant's defense, and such as the jury could only have drawn one inference or conclusion therefrom, we see no error in the direction of the court. We are of the opinion that the direction of the verdict was within the rules so often laid down by this court: *Bates v. Fremont etc. R. R. Co.*, 4 S. Dak. 394.

Finding no error in the record, the judgment of the circuit court is affirmed.

Fuller, J., took no part in the decision.

NEGOTIABLE INSTRUMENTS—DELIVERY ACCORDING TO PURPOSE.—As a general rule, a negotiable promissory note, like any other written contract, has no legal inception or valid existence, as such, until it has been delivered in accordance with the purpose and intent of the parties: *Cline v. Guthrie*, 42 Ind. 221; 13 Am. Rep. 357.

NEGOTIABLE INSTRUMENTS—DELIVERY IN VIOLATION OF CONDITION IMPOSED BY MAKER.—One who signs or indorses a note as surety cannot defend an action thereon, either by the innocent payee or any other bona fide holder for value, on the ground that the principal maker, to whom he intrusted the note, delivered the same in violation of a condition that a certain other person or persons should also first sign or indorse as cosureties; See monographic note to *Bedell v. Herring*, 11 Am. St. Rep. 315, discussing the validity of instruments put in circulation in violation of instructions or conditions, but citing cases, however, denying the rule. That a parol condition to a promissory note will not affect innocent holders, see note to *Jennings v. Todd*, 40 Am. St. Rep. 382.

TRIAL—DIRECTING VERDICT.—If the weight of evidence is so much in favor of one side that a verdict contrary to it would be set aside, the court should direct a verdict: Note to *Moore v. Baker*, 51 Am. St. Rep. 206; *Hite v. Metropolitan etc. Ry. Co.*, 130 Mo. 132; 51 Am. St. Rep. 555; *Schuerman v. Dwelling House Ins. Co.*, 161 Ill. 437; 52 Am. St. Rep. 377.

IN RE TAYLOR.

[7 SOUTH DAKOTA, 382.]

CRIMINAL LAW—PUNISHMENT—EXCESSIVE SENTENCE.—If a court has jurisdiction of the person and of the offense, the imposition of a sentence in excess of what the law permits does not render the legal or authorized portion of the sentence void, but only leaves such portion of the sentence as may be in excess open to question and attack.

HABEAS CORPUS—EXCESSIVE SENTENCE—VALIDITY OF.—If a sentence includes that which a court has a right to include, and something more, the excess only is void when such excess is separable, and may be dealt with without disturbing the valid portion of the sentence; and habeas corpus cannot be invoked until

the time has expired to which the judgment should have been limited. Hence, if one is sentenced, by mistake, to five years' imprisonment, where a sentence of two years only can be imposed, the sentence is valid as to the two years but void as to the three years, and the prisoner is not entitled to discharge on habeas corpus until after the expiration of two years.

Application for a writ of habeas corpus.

Horner & Stewart, for the petitioner.

Coe I. Crawford, attorney general, and John A. Holmes, state's attorney, for the state.

383 **CORSON, P. J.** The petitioner, William Walter Taylor, presented to this court his petition for a writ of habeas corpus, alleging therein that he was illegally restrained of his liberty by the sheriff of Hughes county. The petitioner set forth in his petition a copy of the indictment, his plea thereto, and judgment of the circuit court of Hughes county. This court thereupon issued its writ of habeas corpus to the sheriff of said Hughes county, who, in obedience to the command in said writ contained, brought before this court the said petitioner, and made return of the cause of his imprisonment and detention by him as sheriff of said county. From the petition and the return, which contain copies of the same indictment, plea, and judgment, it appears that the petitioner was indicted by the grand jury of Hughes county for the crime, as stated generally in the indictment, of "embezzlement." To this indictment the prisoner pleaded guilty as charged in the indictment, and the petitioner was thereupon adjudged by the circuit court of the sixth judicial circuit, in and for Hughes county, to be imprisoned in the state's prison of the state of South Dakota for the period of five years. The learned counsel for the petitioner contend that the law under which the petitioner was indicted did not authorize the court to impose a sentence of imprisonment for a period exceeding two years, and that, as the sentence imposed was for a period of five years, the judgment is void, and the petitioner is entitled to be discharged from custody. The learned attorney general and state's attorney insist that the court was authorized to impose a sentence of five years under the law. But they further insist that, if the sentence for five years was not authorized by law, the judgment is a legal and valid judgment for two years, and hence the petitioner would not be entitled to be discharged until the end of the two years, in any event.

³⁸⁴ The last proposition of counsel is, in our view of the case, the only one necessary to be discussed on this application; and we have not, therefore, considered, and do not express any opinion upon, the first proposition of the counsel, namely, as to whether or not the sentence should have been limited to two years. Assuming, then, for the purposes of this decision only—but, as before stated, without deciding or expressing any opinion upon the question—that the circuit court had no authority to sentence the petitioner for a period exceeding two years, is the judgment of the circuit void in toto, or is it only void as to the period in excess of two years? If the judgment is absolutely void, then the petitioner would be entitled to his discharge. But if valid for the two years, and only void for the excess, he must be remanded, as his detention at this time is legal.

There is an irreconcilable conflict in the authorities upon the question as to whether such a judgment is void as in the entire sentence, or only void as to the excess. After a careful consideration of the subject and an examination of nearly all the authorities cited, we are of the opinion that the weight of authority at the present time is that such a judgment is valid to the extent that the court had power or authority to sentence a defendant, and only void as to the excess, and that a defendant may lawfully be held under such a judgment for the period for which the court had power and authority to sentence him. This seems to have been the view taken by the supreme court of New York in *Ex parte Sweatman*, 1 Cow. 144, decided in 1823, and that decision has since been generally followed in that state: *People v. Liscomb*, 60 N. Y. 559; 19 Am. Rep. 211; *People v. Jacobs*, 66 N. Y. 8; *People v. Baker*, 89 N. Y. 460. The supreme court of Ohio has taken the same view: *Ex parte Shaw*, 7 Ohio St. 81; 70 Am. Dec. 55; *Ex parte Van Hagan*, 25 Ohio St. 426. The Massachusetts supreme court holds a similar doctrine: *Sennott's case*, 146 Mass. 489; 4 Am. St. Rep. 344. In the latter case the court says: "The better rule seems to be, that where a court has jurisdiction of the person and of the offense, the imposition, by mistake, of a sentence in excess of what the law permits, is ³⁸⁵ within the jurisdiction and does not render the sentence void, but only voidable by proceedings upon a writ of error." The supreme court of Wisconsin, in the cases of *In re Graham* and *In re McDonald*, 74 Wis. 450, 17 Am. St. Rep. 174, clearly announces the same doctrine. In those cases the sentence was in one case for thirteen years and in the other for

fourteen years, while the law under which the convictions were had limited the punishment to ten years. The defendants applied for writs of habeas corpus, upon the ground that "the sentences were for a term in excess of the period fixed by statute," and therefore void. The court, in its decision, says: "We deny the writs for the reason that the error in the judgments does not render them void, or the imprisonment under them illegal, in that sense which entitles them to be discharged on a writ of habeas corpus. The judgments are doubtless erroneous, and would be reversed on a writ of error. . . . But the judgments are not void. Graham made a second application for the writ, which was again denied and the case was brought before the supreme court of the United States upon writ of error, and the decision in the latter court affirmed. The case is reported as *In re Graham*, 138 U. S. 461. In its decision the supreme court of the United States, speaking through Mr. Justice Field, says: "That the prisoner should not have been sentenced for any time in excess of the ten years is very evident. When the ten years have expired, it is probable the court will order the prisoner's discharge, but until then he has no right to ask the annulment of the entire judgment. Such being the ruling of the state court, and there being nothing in it repugnant to any principle of natural justice, we think that the reason given for the refusal of the writ of habeas corpus in the court below at the present time is a sound one." The same doctrine is held by the supreme court of Iowa (*Elsner v. Shrigley*, 80 Iowa, 30), and the supreme court of South Carolina (*Ex parte Bond*, 9 S. C. 80; 30 Am. Rep. 20).

The counsel for the petitioner have cited quite a number of decisions made by courts whose opinions are entitled to great consideration, ³⁵⁰ holding that such a judgment is entirely void, and that the party is entitled, in such case, to his discharge from custody. In the cases of *Ex parte Page*, 49 Mo. 291, and *Ex parte Cox* (Idaho, Jan. 18, 1893), 32 Pac. Rep. 197, the supreme court of Missouri and the supreme court of Idaho held, squarely, that such a judgment is void. We are inclined to the opinion that the case cited from California, of *Ex parte Kelly*, 65 Cal. 154, and other late cases in that state, fairly support the contention of counsel, and we are inclined to include that state with Missouri and Idaho, as holding the doctrine that such a judgment as we are assuming exists in this case would be void, and the defendant entitled to his discharge. Indiana may

also be included as holding a similar doctrine, though by a divided court: *Miller v. Snyder*, 6 Ind. 1. Mr. Black, in his work on Judgments, section 258, takes a similar view of such a judgment. But his work was evidently written before the later decisions in Massachusetts and Wisconsin, and the decisions of the supreme court of the United States, that we shall subsequently refer to. And we think that if that learned law-writer was to revise his work, in view of these later decisions, he would arrive at a different conclusion. In the light, therefore, of these later decisions, we are unable to give to his conclusions the considerations that they otherwise might be entitled to. And counsel for the petitioner insists that this court has decided this question in *In re Lackey*, 6 S. Dak. 526. But it will be noticed, by the statement of facts in the opinion in that case, that Lackey had served out the legal part of his sentence, and this court held that, such being the case, he was entitled to his discharge, as the latter part of the sentence was void. If the petitioner in the case at bar had served his two years, for which he could have been, as it seems to be conceded, legally sentenced, this court, under the rule laid down in the *Lackey* case, if it should be of opinion that two years was the extent to which he could be sentenced, might discharge him. But that is not the case now before us.

We have omitted a number of cases cited by counsel for petitioner, for the reason that, in our view, they involve entirely different ³⁸⁷ questions from the one now before us, or support the contention of counsel for the state. As, for example, *Ex parte Lange*, 18 Wall. 176, is confidently relied upon as supporting the contention of the petitioner. But that case, even without the aid of subsequent decisions of the supreme court of the United States, to which we shall refer, seems to us to clearly sustain the view that we take of this judgment. In that case a circuit court of the United States had rendered a judgment, and sentenced a defendant to pay a fine and to imprisonment, when the law only authorized the court to impose a fine or imprisonment. The defendant paid the fine, and subsequently that court set aside the judgment it had rendered, and sentenced the defendant to imprisonment. The defendant, being taken into custody upon the latter judgment, applied to the supreme court of the United States for a writ of habeas corpus. The supreme court held that the first judgment was not void, and, the defendant having paid the fine imposed, the circuit court had no power

to render the second judgment, and that the second judgment was void. That court, speaking of the first judgment, on page 174, says: "The judgment first rendered, though erroneous, was not absolutely void. It was rendered by a court which had jurisdiction of the party and of the offense, on a valid verdict. The error of the court in imposing the two punishments mentioned in the statute, when it had only the alternative of one of them, did not make the judgment wholly void." It will be seen that the supreme court held the first judgment valid so far as it imposed a fine, and, that fine having been paid, the circuit court had no power to set aside the judgment so satisfied and render a second judgment, and that, consequently, the second judgment was absolutely void. The circuit court had no jurisdiction or power to render the second judgment. Its attempt, therefore, to render a second judgment, was an idle and futile act, without any validity for any purpose. Not only is this decision important in holding that the first judgment of the circuit court, which imposed a sentence of fine and imprisonment, when it was only authorized to impose a sentence of a fine or imprisonment, was not void, but ³³⁸ for the reason that the court, in the opinion, clearly announces the principle that where a judgment includes that which a court has a right to include, and something more, the excess only is void. The court, in commenting upon the case of *Bigelow v. Forrest*, 9 Wall. 339, says: "But why could it not? Not because it wanted jurisdiction of the property or of the offense, or to render a judgment of confiscation, but because, in the very act of rendering a judgment of confiscation, it condemned more than it had authority to condemn. In other words, in a case where it had full jurisdiction to render one kind of a judgment, operative upon the same property, it rendered one which included that which it had a right to render, and something more, and this excess was held simply void. The case before us is stronger than that, for, unless our reason has been entirely at fault, the court, in the present case, could render no second judgment against the prisoner. Its authority was ended. All further exercise of it in that direction was forbidden by the common law, by the constitution, and by the dearest principles of personal rights, which both of them are supposed to maintain." We have considered the case of *Ex parte Lange*, 18 Wall. 176, at considerable length, for the reason that that case is often cited to sustain the opposite theory.

The counsel for petitioner also cite *Ex parte Rowland*, 104 U. S. 604; *In re Mills*, 135 U. S. 263; *Ex parte Nielsen*, 131 U. S. 176; *In re Coy*, 127 U. S. 731; *Ex parte Seibold*, 100 U. S. 371; *In re Snow*, 120 U. S. 274; *Ex parte Wilson*, 114 U. S. 417. But, in our view, these cases do not support the contention of counsel. In several of these cases the judgments were held void upon various grounds, and the defendants discharged, but none of them involved the question we are now considering. We do not deem it necessary to further discuss them. The cases of *In re Petty*, 22 Kan. 477, and *In re Dill*, 32 Kan. 668, 49 Am. Rep. 505, cited by counsel, do not seem to us to support their contention. The headnote in the first case is as follows: "Where the court has jurisdiction of the person of the prisoner, and of the offense ³⁸⁹ with which he is charged, and the verdict is valid, and the judgment pronounced is not void, but merely irregular, held, such prisoner cannot be relieved under a petition for habeas corpus." This certainly does not indicate that the court held the doctrine contended for. We also fail to find anything in the second case to support counsel's contention. Though there is this conflict in the decisions of the state courts we have shown exists upon this question, the supreme court of the United States, in two late cases, clearly hold the doctrine that a sentence of a court having jurisdiction of the offense and of the person of the defendant is legal so far as it is within the provisions of the law, and only void as to the excess, when such excess is separable, and may be dealt with without disturbing the valid portions of the sentence. In *In re Bonner*, 151 U. S. 242, decided in January, 1894, the supreme court of the United States, speaking through Mr. Justice Field, says: "If the court is authorized to impose imprisonment, and it exceeds the time prescribed by law, the judgment is void for the excess." Further on in the opinion that learned judge says: "A question of some difficulty arises, which has been disposed of in different ways, and that is as to the validity of a judgment which exceeds in its extent the duration of time prescribed by law. With many courts and judges—perhaps with the majority—such judgment is considered valid to the extent to which the law allowed it to be entered, and only void for the excess. Following out this argument, it is further claimed that therefore the writ of habeas corpus cannot be invoked for the relief of a party until the time has expired to which the judgment should have been limited."

Subsequently, in April of that year, the question was squarely decided, by a unanimous court, in *United States v. Pridgeon*, 153 U. S. 48. In that case the court, speaking through Mr. Justice Jackson, says: "Without undertaking to review the authorities in this and other courts, we think the principle is established that, where a court has jurisdiction of the person and of the offense, the imposition of a sentence in excess of what the law permits does not render the legal or authorized portion of the sentence void, but ³⁹⁰ only leaves such portion of the sentence as may be in excess open to question and attack. In other words, the sound rule is, that a sentence is legal so far as it is within the provisions of law and the jurisdiction of the court over the person and offense, and only void as to the excess, when such excess is separable, and may be dealt with without disturbing the valid portion of the sentence. Many well-considered authorities, in England as well as in this country, hold that, where there is jurisdiction of the person and of the offense, the excess in the sentence of the court beyond the provisions of law is only voidable in proceeding upon a writ of error: *Ex parte Lange*, 18 Wall. 163; *Sennott's case*, 146 Mass. 489; 4 Am. St. Rep. 344; *People v. Kelly*, 97 N. Y. 212; *People v. Liscomb*, 60 N. Y. 559; 19 Am. Rep 211; *People v. Jacobs*, 66 N. Y. 8; *Ex parte Shaw*, 7 Ohio St. 81; 70 Am. Dec. 55; *Ex parte Van Hagan*, 25 Ohio St. 426; *In re Graham*, 74 Wis. 450; 17 Am. St. Rep. 174; *Elaner v. Shrigley*, 80 Iowa, 30; *Ex parte Max*, 44 Cal. 579. Under a writ of habeas corpus, the inquiry is addressed, not to errors, but to the question whether the proceedings, and the judgment rendered therein, are, for any reason, nullities; and, unless it is affirmatively shown that the judgment or sentence under which the petitioner is confined is void, he is not entitled to his discharge. It may often occur that the sentence imposed may be valid in part and void in part, but the void portion of the judgment or sentence should not necessarily, or generally, vitiate the valid portion. By section 761 of the Revised Statutes, 'the court or justice or judge shall proceed in a summary way to determine the facts of the case [in habeas corpus] by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require.' There is no law or justice in giving to the prisoner relief under habeas corpus that is equivalent to an acquittal, when, upon writ of error, he could have secured relief from that portion of the sentence which was void. In the present case, the five years term of im-

prisonment, to which Pridgeon was sentenced, cannot properly be held void because of the additional imposition of 'hard labor' during his confinement. Thus, in *In re Swan*, 150 U. S. 637, it is stated that ³⁹¹ 'even if it is not within the power of the court to require payment of costs, and its judgment, to that extent, exceeded its authority, yet he cannot be discharged on habeas corpus until he has performed so much of the judgment, or served out so much of the sentence, as it was within the power of the court to impose.' We have not deemed it necessary to review, or attempt to reconcile, the authorities on the question, for the reason that while all concede that neither irregularities nor error, so far as they were within the jurisdiction of the court, can be inquired into upon a writ of habeas corpus, because a writ of habeas corpus cannot be made to perform the functions of a writ of error, in relation to proceedings of a court within its jurisdiction, they differ widely as to what constitutes error, and what should be regarded as rendering the judgment or proceedings void."

In the case at bar we see no difficulty in separating the sentence for two years, for which it is conceded the petitioner might have been sentenced, from the three years, assumed by us and claimed by counsel to be in excess of the time the petitioner could have been sentenced. Neither the supreme court of Wisconsin nor the supreme court of the United States seem to have discovered any difficulty in so separating the valid from the invalid portions of the sentence in *Graham's case*. The decision in *United States v. Pridgeon*, 153 U. S. 48, read in connection with *In re Graham*, 74 Wis. 450, 17 Am. St. Rep. 174, fully interprets the meaning of that court in the use of the expression, "when such excess is separable, and may be dealt with without disturbing the valid portions of the sentence." Ten years, says the court, in effect, in *In re Graham*, 74 Wis. 450, 17 Am. St. Rep. 174, is easily separable from the three years—the void excess in the judgment. "When the ten years have expired," says the court, "probably the court will order the prisoner's discharge, but until then he has no right to the annulment of the entire judgment." So we say here, when two years shall have expired, no other proceedings having been taken in the mean time to correct the judgment, if, upon examination, it should prove to be erroneous as to the term imposed, the petitioner would be in a position to ask for his discharge. But he is now held under legal process from a court of competent jurisdiction.

392 It was urged by the counsel for the petitioner that the statutes in the states of Wisconsin and New York materially influenced those courts in holding such judgments only erroneous, and not void. But we fail to see how the statute affects the question of what constitutes a void judgment. The learned counsel for the petitioner also seem to attach much importance to the clause in our habeas corpus act which provides that a defendant "can be discharged only for some one of the following causes: 1. Where the court has exceeded the limit of its jurisdiction either as to the matter, place, sum or person." And they strenuously contend that when the court, in this case, sentenced the prisoner to the penitentiary for the period of five years, when, as they contend, his sentence should not have exceeded two, the court exceeded the limit of its jurisdiction. Now, what is jurisdiction? Bouvier defines it as "the authority by which judicial officers take cognizance of and decide cases; power to hear and determine a cause." "Jurisdiction of the cause is the power over the subject matter given by the law of the sovereignty in which the tribunal exists." When and how does the court exceed the limit of its jurisdiction? As a court of general jurisdiction, the circuit court had jurisdiction over the offense charged in the indictment, and over the person of the petitioner. The court has not exceeded the limit of that jurisdiction. It may be, as claimed, that it has committed an error in sentencing the petitioner to a term longer than the law permits. The excess beyond the limit of the law would constitute error, and render the excess void. But, to our minds, there is no excess of jurisdiction. As an illustration of what constitutes excess of jurisdiction take *People v. Liscomb*, 60 N. Y. 559; 19 Am. Rep. 211. The court sentenced the defendant to the limit of the law, upon the first count in the indictment. In imposing the second sentence upon the second count, it exceeded its jurisdiction, because it had heard and decided the case and pronounced judgment—all the judgment it was authorized to pronounce. When, therefore, the court assumed to add a second judgment and sentence, it exceeded the limit of its jurisdiction. In other words, the court had no power to make the 393 second or additional judgment. When it rendered the judgment and all the judgment the law authorized, its power was exhausted, and its attempt to add a second judgment or sentence was an attempt to do an act without, or in excess of the limit of, its jurisdiction. *Ex parte Lange*, 18 Wall. 176, also illustrates what is meant by the term "exceeding the limit of its

jurisdiction," as applied to a court. In that case the circuit court had rendered one judgment which had been satisfied, and the court then attempted to set that aside and render a second judgment, and the supreme court of the United States says that it had no jurisdiction to render the judgment. "The power was exhausted. Its further exercise was prohibited. It was error, but it was error because the power to render any further judgment did not exist." But when the circuit court, in the case at bar, was rendering judgment, it was doing precisely what it was authorized to do by virtue of its jurisdiction over the offense charged, and of the petitioner; and it rendered a judgment in its nature such as it was authorized to render, namely, a judgment of imprisonment in the state's prison of this state. Assuming that, in rendering that judgment, it should have designated the term two years, instead of five, the court committed an error, but it never exceeded the limit of its jurisdiction. It simply imposed a sentence in excess of what the law permits, while properly exercising its jurisdiction. Upon this question, we may be justified in again quoting the language of the supreme court of Massachusetts in Sennott's case, 146 Mass. 489; 4 Am. St. Rep. 344: "The better rule seems to be that, where a court has jurisdiction of the person and of the offense, the imposition, by mistake, of a sentence in excess of what the law permits, is within the jurisdiction, and does not render the sentence void." We conclude, therefore, that the court in this case did not exceed the limit of its jurisdiction, but simply, if the term fixed is in excess of that authorized by law, committed an error in the exercise of its jurisdiction. These conclusions necessarily require us to remand the petitioner to the custody of the sheriff of Hughes county, and it is so ordered.

It is due to the learned counsel, both on the part of the petitioner and the state, to say that their exhaustive researches and able presentation of the questions have greatly aided the court in the investigation of the question involved, and in arriving at a conclusion.

Fuller, J., concurring.

HABEAS CORPUS—VALIDITY OF EXCESSIVE SENTENCE.—A whole sentence is not void, on habeas corpus, because of an excess, where the court had jurisdiction of the person and the offense. It is invalid only as to the excess, when such excess is separable, and may be dealt with without disturbing the valid portion of the sentence: *State v. Klock*, 48 La. Ann. 67; 55 Am. St. Rep. 259, and monographic note thereto discussing the validity of sentences differing from those authorized by law.

money to relieve indigent persons may recover the same from the person or municipal authority obligated to support such persons only in case of a neglect of such obligation or a refusal to support such persons: *Ashland County v. Richland County Infirmary*, 7 Ohio St. 65; 70 Am. Dec. 49. Compare monographic note to *Colebrook v. Stewartstown*, 64 Am. Dec. 279-281, on liability to support relations.

PLEADING—MISJOINDER OF CAUSES OF ACTION—DEMURRER.—If a complaint contains a statement of one good cause of action, and an attempted statement of another calling for a species of relief which cannot be granted under any state of the pleadings, a demurrer for misjoinder of causes of action does not lie, provided the complaint contains a continuous statement of facts and is not divided into separate counts or causes of action: *Times Pub. Co. v. Everett*, 9 Wash. 518; 43 Am. St. Rep. 865.

PLEADING.—A DEMURRER to a complaint or answer should be overruled if one good cause of action or defense, is stated: *Smith v. Salomon*, 1 Colo. 176; 91 Am. Dec. 711; *Freeland v. McCullough*, 1 Denio, 414; 43 Am. Dec. 685, and note; *Oliphant v. Markham*, 79 Tex. 543; 23 Am. St. Rep. 363; *El Modell etc. Mfg. Co. v. Gato*, 25 Fla. 886; 23 Am. St. Rep. 537.

MALLOY v. BREWER.

[7 SOUTH DAKOTA, 587.]

WITNESSES—PRIVILEGE FROM SERVICE OF PROCESS.—A resident of a sister state, while attending a court of this state as a witness, but not in obedience to any subpoena, cannot be legally served with process for the commencement of a civil action against him; and this immunity depends upon grounds of public policy.

WITNESSES—PRIVILEGE FROM SERVICE OF PROCESS.—CONSTRUCTION OF STATUTE.—A statute providing that: "A witness shall not be liable to be sued in a county in which he does not reside, by being served with a summons in such county while going, returning, or attending in obedience to a subpoena," does not include, or apply to, witnesses coming into this state from another state.

Action by Mary Malloy against S. H. Brewer. The plaintiff appealed from an order setting aside a service of summons.

Joe Kirby, for the appellant.

Bailey & Voorhees, for the respondent.

588 CORSON, P. J. The respondent, a resident of Sioux City, Iowa, was served with a summons and complaint in this action at Salem, in McCook county, in this state, where he was in attendance upon the circuit court as a witness in an action on trial in that court. The circuit court, on motion, set aside the service of the summons, and canceled the judgment entered in the action, and the plaintiff appeals. The affidavit of the respondent, after stating the facts as to his residence, that he

was in attendance upon the circuit court of McCook county as a witness when served with the summons, etc., concludes: "That deponent was not present at said Salem on said occasion, or within the state, for a longer period than was necessary for deponent ⁵⁸⁹ to get from his home at Sioux City, Iowa, to said Salem, to attend the trial of said cause as a witness, and to return to his home in said Sioux City." In the affidavit of Mr. Kirby, the attorney for the plaintiff and appellant, it is stated "that said S. H. Brewer [respondent] was not present in the state of South Dakota on or about the eleventh day of April, 1894 [date of service of summons], or attending the trial of said action mentioned in his affidavit, in response or obedience to a subpoena." These statements are uncontradicted. It will thus be seen that the only question presented for our determination is, Was the service upon the defendant of the summons, while in this state as witness in an action pending therein, but not in obedience to any subpoena, a valid service?

Counsel for appellant contend that by the terms of section 5274 of the Compiled Laws, a witness is only exempt from the service of a summons when he is in attendance upon a court in obedience to a subpoena, and that, as it affirmatively appears in this case that the respondent was not in attendance as such witness in obedience to a subpoena, the service upon him was legal and valid. The section reads as follows: "A witness shall not be liable to be sued in a county in which he does not reside, by being served with a summons in such county while going, returning, or attending in obedience to a subpoena." He further contends that under the rules for construing our code prescribed by sections 2505 and 4808 of the Compiled Laws, the general rule of law applicable to witnesses coming into the state from another state is not in force in this state. The sections referred to read as follows:

"Sec. 2505. In this territory there is no common law in any case where the law is declared by the codes."

"Sec. 4808. No statute, law, or rule is continued in force because it is consistent with the provisions of this code on the same subject; but in all cases provided for by this code, all statutes, laws, and rules heretofore in force in this territory, whether consistent or not with the provisions of this code, unless expressly continued in ⁵⁹⁰ force by it, are repealed and abrogated. This repeal or abrogation does not revive any former law heretofore repealed, nor does it affect any right already exist-

ing or accrued, or any action or proceeding already taken, except as in this code provided; nor does it affect any private statute not expressly repealed."

Counsel for respondent insist that section 5274 only provides a rule applicable to witnesses residing in this state, and does not include witnesses coming into this jurisdiction from another state, and hence the general rule applicable to such witnesses should be applied to a witness from other states coming into this state, without regard to whether he is in attendance by virtue of a subpoena or not. Undoubtedly, if section 5274, relied upon by appellant, was intended to, and does by a fair construction of its language, include witnesses coming into this state from another state, that section must control this case. But it is quite clear from the language of this section that it only applies to witnesses residing in this state, as the expression, "in a county in which he does not reside," presupposes that the witness referred to resides in some county in the state; and the other expression, "attending in obedience to a subpoena," can only apply to witnesses residing in this state, as no subpoena issued in this state can be efficiently served upon a witness without the state. It would seem, therefore, that witnesses coming here from another state are not included in that section, and that the case of such witnesses is not provided for by the statute, but, like parties to actions coming from another state, are without the provisions of the code, and the exemption or nonexemption of such witnesses from the service of process is to be determined from the general law upon the subject.

Counsel for appellant contends that this question was settled by the decision in *Fisk v. Westover*, 4 S. Dak. 233; 46 Am. St. Rep. 780. But we discover nothing in the opinion in that case inconsistent with the views herein expressed. The court in that case was considering the exemption or nonexemption of parties ⁵⁹¹ to the action coming from another state, and, in holding that the section mentioned only referred to witnesses, and not to parties, the court did not decide nor intend to decide what class of witnesses were included and provided for by the section. In this case, however, it becomes necessary to determine that question, and hence we have given the section careful attention, and we are satisfied that the section does not include witnesses coming from another state. There being no provision in our code affecting this question, it must be determined from

an examination of the general law upon the subject. The weight of authority in this country seems to sustain the position of the respondent, namely, that a resident of another state, who has in good faith come into this state as a witness to give evidence in a cause pending in one of our courts, is exempt from service with process for commencing an action against him. We cite from the numerous decisions upon this question the following, in which the rule as above stated has been announced: *Person v. Grier*, 66 N. Y. 124; 23 Am. Rep. 35; *Dungan v. Miller*, 37 N. J. L. 182; *Wilson v. Donaldson*, 117 Ind. 356; 10 Am. St. Rep. 48; *Mitchell v. Circuit Judge*, 53 Mich. 541; *Sherman v. Gundlach*, 37 Minn. 118; *Palmer v. Rowan*, 21 Neb. 452; 59 Am. Rep. 844; *Hayes v. Shields*, 2 Yeates, 222; *Bolgiano v. Lock Co.*, 73 Md. 132; 25 Am. St. Rep. 582. The federal courts seem to have adopted the same rule: *Atchison v. Morris*, 11 Fed. Rep. 582; *Small v. Montgomery*, 23 Fed. Rep. 707; *Kauffman v. Kennedy*, 25 Fed. Rep. 785. The rule is founded upon principles of public policy and the due administration of justice, which is subserved by the presence of witnesses to give their evidence orally before the court. The privilege protects the witness in going, in staying, and returning to his home, provided he acts in good faith and without unreasonable delay. This immunity from such service, depending as it does upon grounds of public policy, does not require statutory authority to enable courts to enforce the rule and set aside a summons thus improperly served. The object of affording such immunity is to encourage witnesses from ⁵⁰² other states to come forward voluntarily and testify, and the rule exempting such witnesses from the service of process while so attending as such witness in another state commends itself to the courts as a wise and proper one. This immunity works no injustice to anyone, for unless the witness comes within the state there would be no opportunity to serve process upon him. Therefore, the plaintiff, who attempts to get service upon the witness while here as such, neither loses any rights nor suffers any injury by reason of this rule. He is simply prevented from taking advantage of the necessary presence of the witness in furtherance of his own private purposes.

The order of the court below is affirmed.

WITNESSES—PRIVILEGE FROM SERVICE OF PROCESS.—A resident of one state who comes into another as a witness in a cause pending there is exempt from process for the commencement of a civil action against him in the latter state: Note to *Capwell v. Sipe*,

83 Am. St. Rep. 893. Compare *Cameron v. Roberts*, 87 Wis. 201; 41 Am. St. Rep. 43; *Powers v. Arkadelphia Lumber Co.*, 61 Ark. 504; 54 Am. St. Rep. 276; *Flisk v. Westover*, 4 S. Dak. 233; 46 Am. St. Rep. 780.

GUDE v. DAKOTA FIRE AND MARINE INSURANCE CO.

[7 SOUTH DAKOTA, 644.]

JUDGMENT OF SISTER STATE—WHEN COMPLAINT UPON, IS SUFFICIENT TO ADMIT IN EVIDENCE A CERTIFIED COPY OF THE JUDGMENT-ROLL.—In an action upon a judgment of a sister state, a complaint alleging that the court in which the judgment was rendered was a court of general jurisdiction, and that the summons and a copy of the complaint were duly and personally served upon the defendant, states facts sufficient to admit in evidence a certified copy of the judgment-roll in said action, although the complaint in that action failed to state, in terms, that the defendant corporation was doing business in the state wherein the judgment was rendered, or had an agent therein when the action was commenced.

PLEADING.—THE PROBATIVE FACTS requisite to prove ultimate facts are matters of evidence, and need not be set out in the complaint.

APPEAL—FINDINGS NOT SUPPORTED BY EVIDENCE.—AN ASSIGNMENT OF ERROR that findings are not supported by the evidence will be disregarded, if the record contains no specification of the particulars in which the evidence is claimed to be insufficient to support the findings.

JUDGMENT OF SISTER STATE—EFFECT OF.—If service of process upon a corporation has been had in strict conformity with the laws of the state, the judgment is entitled to have the same credit and faith given to it in another state which it has in the state where in it was rendered.

FOREIGN INSURANCE COMPANIES—SUFFICIENCY OF SERVICE OF PROCESS.—As it is competent for a state, as a condition upon which it will permit a corporation to do business within its jurisdiction, to prescribe who shall, for the purposes of serving process upon such corporation, represent it in the state, service upon such person must ordinarily be deemed sufficient. It may, therefore, be made upon a mere soliciting agent of an insurance company where the statute authorizes it.

FOREIGN INSURANCE COMPANIES—WHAT LAW GOVERNS AS TO SERVICE OF PROCESS.—If an insurance company, incorporated under the laws of this state, issues a policy of fire insurance to parties in another state, upon fixed property in that state, the company, in an action upon the policy in that state, is subject to the laws of that state as to the service of process upon the corporation.

Action upon a foreign judgment. There was a verdict for the plaintiffs and the defendant appealed from an order denying a new trial.

Preston & Hannet, for the appellant.

H. H. Keith, for the respondents.

⁶⁴⁶ CORSON, P. J. This was an action upon a judgment rendered by default in the state of Minnesota. The complaint is in the usual form. The defendant answered, and after denying the allegations of the complaint, except the due incorporation of the defendant under the laws of this state, alleged, in substance, that when the proceedings in the said action were commenced and the judgment rendered, the defendant was not served with process in said action, and had no notice of the pendency of the same, and that it had no agent in the state of Minnesota upon whom summons could be served. The case was tried by the court without a jury, and the findings of fact, conclusions of law, and judgment were in favor of the plaintiff. A motion for a new trial was made and denied, and the defendant appeals.

The appellant, an insurance company incorporated under the laws of this state, and having its principal place of business at Mitchell, in this state, issued a policy of insurance to the plaintiffs, upon an elevator and personal property therein, situated in the city of Duluth, state of Minnesota, insuring them against loss by fire. The property having been destroyed by fire, the respondents Gude Brothers, instituted an action in the district court of the county of St. Louis, in the state of Minnesota, upon the policy so issued, and recovered the judgment sued upon in this action. No answer was filed or served by defendant in that action, and there was no appearance by anyone on its behalf. Upon the trial of this action, the plaintiff offered in evidence a duly certified copy of the judgment-roll filed in the district court of St. Louis county, in the state of Minnesota, which was objected to on the following grounds: "Defendant objects to the introduction of the papers named and offered in evidence, for the reasons: 1. That it does not appear from the complaint upon which said judgment was based that the ⁶⁴⁷ defendant was at the time said action was commenced doing business in the state of Minnesota; 2. It nowhere appears in said complaint that the said defendant was at any time doing business in the state of Minnesota; 3. If further appears in said judgment-roll that no personal service was made upon said defendant, or upon any of the officers thereof, or upon any manager or agent thereof within the state of Minnesota; 4. That it further appears from the complaint in the action upon which said judgment was obtained that the said defendant was a foreign corporation." The objection was overruled, and the defendant excepted, and the rul-

ing of the court is assigned as error. This ruling of the court, in our opinion, was correct. The plaintiffs allege in their complaint that the district court in which said judgment was rendered was a court of general jurisdiction, and that the "summons, together with a copy of the complaint in said action, was . . . duly and personally served on the above named defendant in said action." These allegations in the complaint were sufficient to admit the certified copy of the judgment-roll in evidence. The ultimate facts that the court in which the judgment was rendered was a court of general jurisdiction, and that the summons and a copy of the complaint were duly and personally served upon the defendant, were all that it was necessary to allege in the complaint. The probative facts requisite to prove these ultimate facts were matters of evidence, and were not required to be set out in the complaint. The recitals in the judgment and accompanying affidavits were *prima facie* evidence, at least, of the facts giving the court jurisdiction: *D'Arcy v. Ketchum*, 11 How. 165; *Lafayette Ins. Co. v. French*, 18 How. 404; *St. Clair v. Cox*, 106 U. S. 350.

The learned circuit court made and filed his findings of fact in the case at bar, the material parts of which are as follows: "3. That on the ninth day of September, 1891, the said defendant . . . was, and for some time prior thereto had been, transacting insurance business in the state of Minnesota; that on the ninth day of September, 1891, in consideration of the payment by plaintiffs to ⁶⁴⁸ defendant of the premium of thirty dollars, the said defendant duly made, executed, and delivered to plaintiff its certain policy of insurance No. 19423, upon the property of the plaintiff, situated in said Duluth, in said state of Minnesota; that said insurance was solicited of the plaintiffs. for and on behalf of said defendant, . . . by William O. Tillotson, acting as the agent of and for and on behalf of said defendant insurance company at said Duluth, and who delivered the policy of insurance to the plaintiffs, and who collected and received the premium therefor, and transmitted the same to the defendant at said Mitchell, in the state of South Dakota, and such premium was received and accepted by said defendant. And . . . which said summons, together with the plaintiff's complaint in said action, was thereafter, and on the seventh day of March, 1892, at the city of Duluth, in said St. Louis county and state of Minnesota, duly and personally served upon the above-named defendant in said action, the Dakota Fire & Marine Insurance

Company, by delivering to and leaving with the said William O. Tillotson, being the same person mentioned in finding No. 3, true and correct copies of said summons and complaint." The learned counsel for the appellant contend that these findings are not supported by the evidence; but, as we fail to discover in the record any specifications of the particulars in which such evidence is claimed to be insufficient to support the findings, we are compelled to disregard this assignment of error, and hold that the findings are conclusive upon this court. Assuming, then, that the findings of the court are correct, we shall not discuss the evidence.

The counsel for the appellant contend that the service upon said Tillotson was not such a service as gave that court jurisdiction to render a judgment binding upon the courts of this state: 1. Because it does not affirmatively appear from the record in that action, nor in the findings of the court in the case at bar, that the defendant was doing business in that state at the time this action was commenced; and 2. Because the service made was not upon an agent of the defendant authorized to do any act binding upon the defendant, other than soliciting insurance in its behalf, ⁶⁴⁰ and that service upon such an agent is not sufficient to give the court jurisdiction. The counsel for the respondents contends that, as the service made as found by the court conformed strictly with the requirements of the laws of Minnesota, the judgment is valid in that state, and that it is therefore entitled to have given to it the same faith and credit in this state that is given to it in the state where rendered. We are inclined to the opinion that the proposition of respondents' counsel is correct when applied to foreign corporations doing business in a state. The law of Minnesota relating to service in such case is as follows: "Service of summons in any action against an insurance company not incorporated under and by virtue of the laws of this state shall, in addition to the mode now prescribed by law, be valid and legal, and of the same force and effect as personal service on a private individual, if made by delivering a copy of the summons and complaint, or the summons alone, to any person who shall solicit insurance on behalf of any such insurance corporation, or property owner, or who transmits an application for insurance, to or from any such insurance corporation, or who makes any contract for insurance, or collects or receives any premium for insurance, or who adjusts or settles a loss, or pays the same for such insurance corporation, or

in any manner aids or assists in doing either": Rev. Stats. 1894, sec. 3158.

While a mere soliciting agent of an insurance company may not possess the power to bind such company by his acts not strictly within the scope of his authority, yet it is competent for a state to provide that service upon such soliciting agent of a foreign insurance company shall be held and taken as due service upon the company. This is upon the theory "that a corporation of one state cannot do business in another state without the latter's consent, express or implied, and that consent may be accompanied with such conditions as it may deem proper to impose": *St. Clair v. Cox*, 106 U. S. 350. In that case the court further says: "If a state permits a foreign corporation to do business within her limits, and at the same time provides that, in suits ⁶⁵⁰ against it for business there done, process shall be served upon its agents, the provision is to be deemed a condition of the permission; and corporations that subsequently do business in the state are to be deemed to assent to such condition as fully as though they had specially authorized their agents to receive service of the process." In the earlier case of *Paul v. Virginia*, 8 Wall. 168, the same court uses the following language: "The corporation, being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created. As said by this court in *Bank of Augusta v. Earle*, 13 Pet. 519: 'It must dwell in the place of its creation, and cannot migrate to another sovereignty.' The recognition of its existence even by other states, and the enforcement of its contracts made therein, depend purely upon the comity of those states—a comity which is never extended where the existence of the corporation or the exercise of its powers is prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in other states, but depending for recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those states may think proper to impose." In *State v. United States etc. Assn.*, 67 Wis. 624, and in *State v. Northwestern etc. Assn.*, 62 Wis. 176, the supreme court of Wisconsin held a similar law in Wisconsin valid, and service made in pursuance of its requirements binding upon the defendant. In the former case, Cassoday, J., has written a very exhaustive and instructive opinion. In *Firemen's Ins. Co. v. Thompson*, 155 Ill. 204, 46 Am. St. Rep. 335, decided by the

supreme court of Illinois in April, 1895, that court holds that a judgment rendered by the district court of Wisconsin, in a case where the service was made in substantially, if not identically, the same manner as the one we are considering, was a valid judgment, and entitled to have given to it the same faith and credit given to it in Wisconsin. As both the court of appeals and the supreme court arrived at the same conclusion, the decision is entitled to great consideration. The fact that the insurance in the case at bar was upon fixed property ⁶⁵¹ described in the policy as situated in Duluth, in the state of Minnesota, fully apprised the defendant that the risk which it assumed to carry was in that state; and if it did not desire to contract insurance in that state subject to the conditions imposed by its laws, it should not have received the premium and issued the policy to citizens of that state. If it choose to accept the risk, it did so upon the terms prescribed by the laws of that state. By assuming the risk within the state of Minnesota, it involuntarily submitted itself to the laws of that state. The recitals in the record show, we think, and the learned circuit judge so found, that the service was in strict conformity with the laws of that state. This being so, the judgment is entitled to have the same credit and faith given to it in this state which it has in the state where rendered. It need scarcely be said that a different rule applies to corporations from that applied to individuals. "A corporation, being an artificial being, can act only through agents, and only through them can be reached, and process must therefore be served upon them": *St. Clair v. Cox*, 106 U. S. 350. Hence, it being competent for a state, as a condition upon which it will permit corporations to do business within its jurisdiction, to prescribe who shall, for the purposes of serving process upon such corporation, represent it in the state, service upon such person must ordinarily be deemed sufficient.

The respective counsel have cited and discussed numerous authorities in their briefs, but, in the view we take of the case, a review of these authorities is not necessary in this opinion. We, however, give a few of those cited bearing upon the questions discussed, in addition to those heretofore referred to: *Pennoyer v. Neff*, 95 U. S. 714; *Hart v. Sansom*, 110 U. S. 151; *Henning v. Planters' Ins. Co.*, 28 Fed. Rep. 440; *Colorado Iron Works v. Sierra Grande Min. Co.*, 15 Colo. 499; 22 Am. St. Rep. 433; *Southern Ins. Co. of New Orleans v. Wolverton Hardware Co.* (Tex. Sup. April 26, 1892), 19 S. W. Rep. 615; *Norfolk etc R.*

R. Co. v. Cottrell, 83 Va. 512; **Pope v. Terre Haute etc. Mfg. Co.**, 87 N. Y. 137.

The judgment of the court below is affirmed.

Kellam, J., took no part in the decision.

FOREIGN INSURANCE COMPANIES—JURISDICTION OVER. A corporation receiving an application to insure property situate in another state and issuing a policy thereon must be deemed to subject itself to the jurisdiction of the courts of that state and to the right of the insured to bring an action upon the policy in the state wherein his property is situate, and to serve process on the insurer in the manner prescribed by the laws of that state. Therefore, if a statute of that state defines who shall be regarded as agents of an insurer and that process may be served upon any of such agents, a judgment based upon the service of such process on such an agent, valid in the state where rendered, is equally valid in a state wherein the insuring corporation has its principal place of business and of which it is a resident: **Firemen's Ins. Co. v. Thompson**, 155 Ill. 204; 46 Am. St. Rep. 335; **Colorado Iron Works v. Sierra etc. Min. Co.**, 15 Colo. 499; 22 Am. St. Rep. 433.

JUDGMENT OF SISTER STATE AGAINST INSURANCE COMPANY—EFFECT OF.—A judgment entered against an insurance corporation is entitled to have the credit, effect, and value in this state which it has in the state where rendered: **Firemen's Ins. Co. v. Thompson**, 155 Ill. 204; 46 Am. St. Rep. 335.

APPEAL.—EXCEPTIONS, to be entitled to consideration on appeal, must point out the error or errors complained of with particularity, and not in general terms: **Atkins v. Field**, 89 Me. 281; 56 Am. St. Rep. 424, and note.

CASES
IN THE
SUPREME COURT
OF
SOUTH CAROLINA.

STATE v. ARNOLD.

[47 SOUTH CAROLINA, 9.]

EVIDENCE—DECLARATIONS—RES GESTAE.—Statements of a man who has been shot, made to a woman and child, as to who shot him, as soon as they could reach him, and within five minutes after the shooting, are admissible as part of the *res gestae*.

EVIDENCE—DECLARATIONS—RES GESTAE.—To make declarations part of the *res gestae*, they must be contemporaneous with the main fact, but they need not be precisely concurrent in point of time. If they spring out of the transaction, elucidate it, and are made at a time so near to it as reasonably to preclude the idea of deliberate design, then they are to be regarded as contemporaneous.

Indictment and conviction for murder. Defendant appealed, on the ground that the trial court committed error in allowing the witnesses Lucy Wardlaw and Janie, her daughter, to testify to an alleged declaration made by the deceased to them after he was shot, as to who had shot him, for the reason that such declaration was hearsay and not admissible either as a dying declaration or as a part of the *res gestae*.

Graydon & Graydon, for the appellant.

Ansel, solicitor, for the state.

¹¹ POPE, J. On the nineteenth day of November, 1895, one George Merryweather was shot, from which wound he almost immediately thereafter died. The defendant, Charles Arnold, was, at the January, 1896, term of the court of general sessions for Abbeville county, in this state, tried before Judge Earle and a jury for having murdered said deceased. He was found guilty of

murder, but recommended to the mercy of the court. Whereupon he was sentenced to imprisonment for life at hard labor in the state penitentiary. His appeal to this court is based upon alleged errors of the circuit judge in the admission of certain testimony, in his refusal to strike out said testimony, and in his refusal to grant a new trial because such testimony was not admissible. Let the grounds of appeal be reported. Thus it appears that the appeal is based upon the question of the competency of certain testimony. Was such testimony competent?

The underlying history of this tragedy, as appears from the record, seems to be this: Charles Arnold, although a married man, seems for some years to have maintained a criminal intimacy with one Lucy Wardlaw, both parties belonging to the African race, and, as the result of such relations, she bore him two children. The deceased, George Merryweather, had been paying attention to said Lucy Wardlaw with a view to marriage. Indeed, such suit of the deceased had gone so far as that an engagement of marriage existed between them. These circumstances seem to have stirred Charles Arnold's nature into a most deadly jealousy, if we are to judge from the many threats of death to both the deceased and Lucy Wardlaw in case she tolerated ¹² the attentions of Merryweather, or in the event of their marriage. So deeply was Arnold stirred by this feeling of jealousy that he was unmoved when the poor woman explained to him that she was weary of her life of sin and wished to become a reputable wife. So on the night of the 19th of November, 1895, just after a terrific wind storm, and long after the woman Lucy and her children had retired to rest in her lowly home, George Merryweather, on his knocking at the door, is admitted therein. He proceeds to load his pistol, having first fired off two chambers. During the time he was so employed he kept up a conversation with the woman. Having completed the loading and greasing of his pistol, after some demurring on the part of the woman, he is given permission to spend the night there. With the door wide open, having taken a drink of water, and after having removed his clothing preparatory to seeking rest, and while at the open door, suddenly some one in the dark, and outside of the house, fires a shot into his body at such close quarters that his underclothing is set on fire. The deceased cries, "Oh!" and staggers off some thirty yards and falls. Upon his call, the woman and the oldest child rush to his relief. They find him putting out the fire on his clothing. What was said was this:

When she asked him, "What was the matter?" he replied, "I am shot." To her question, "You are not shot, are you?" he replied, "Yes; Charlie has shot me to death." Calling for and obtaining aid, he is removed to her room and laid on a pallet in front of the fire, and soon dies. When the woman and her little daughter testify, they fix the time between the firing of the fatal shot and that when they reached the deceased at five or ten minutes. But they also describe minutely the circumstances which intervened the shot and the time of reaching the deceased after he was shot, which necessarily impress the mind with the conclusion that it was a shorter interval of time than five or ten minutes, thus demonstrating that the witnesses use the terms "five or ten minutes" without ¹³ a due appreciation of time fixed thereby. If the expressions used by the deceased show that he regarded himself as in extremis, as viewing himself as bound to die, then this testimony is entitled to be admitted as a "dying declaration," and, if this be so, it was competent. We so regard it.

But was it entitled to be considered as "*res gestae*?" The judge so held, under the authority of the decision of *State v. Belcher*, 13 S. C. 459. We know it is dangerous ground that we now travel, but it must be traveled for the question is fairly presented. Judge McGowan, in the case last cited, in referring to this matter, says: "When the inquiry is as to a certain transaction, not only what was done, but also what was said by those present during the transaction, is admissible for the purpose of showing its character. Thus, as an illustration, it was held, in the prosecution of Lord George Gordon for high treason, that the cry of the mob which accompanied the prisoner was admissible as a part of the transaction: *Rex v. Gordon*, 21 How. St. Tr. 534. Declarations which accompany the act characterize it; but, to do so, the declarations must be by the persons engaged in the act, contemporaneous with it, if not precisely concurrent in point of time, and proved as other facts by witnesses. To make declarations a part of the *res gestae*, they must be contemporaneous with the main fact, *not, however, precisely concurrent in point of time. If they spring out of the transaction, elucidate it, and are made at a time so near to it as reasonably to preclude the idea of deliberate design, they are then to be regarded as contemporaneous*" (italics used in the last two sentences are ours), and cases cited. It does seem to us, that the judge did not err in holding that the circumstances established by the witnesses as

having occurred when this declaration of the deceased was made show that the deceased could not have formed a deliberate design to speak falsely, and that such proof of the circumstances of this case clearly bring it within the limits fixed in the case of *State v. Belcher*, 13 S. C. 459.

¹⁴ It is the judgment of this court that the judgment of the circuit court be affirmed.

EVIDENCE—RES GESTAE—DECLARATIONS.—*Res gestae* are the circumstances, facts, and declarations which grow out of the main fact, are contemporaneous with it, and serve to illustrate its character: *Pinney v. Jones*, 64 Conn. 545; 42 Am. St. Rep. 209, and note; *Hermes v. Chicago etc. Ry. Co.*, 80 Wis. 590; 27 Am. St. Rep. 69. See, also, note to *Wilson v. Southern Pac. Co.*, 57 Am. St. Rep. 771. On the trial of a man for the murder of his wife, declarations made by her immediately after the deadly assault upon her, upon emerging from the room in which it took place, are admissible in evidence as part of the *res gestae*: *Von Pollnitz v. State*, 92 Ga. 16; 44 Am. St. Rep. 72; *Lewis v. State*, 29 Tex. App. 201; 25 Am. St. Rep. 720. A dying declaration that "Jim Sullivan cut me; he cut me for nothing; I never did anything to him," is admissible in evidence; but if such declaration include the further words, "I pray God to forgive him," this part should be excluded, because it does not in any way relate to, or shed light upon, the killing or what had apparently led to it: *Sullivan v. State*, 102 Ala. 185; 48 Am. St. Rep. 22, and note.

WRAGGE v. SOUTH CAROLINA AND GEORGIA RAILROAD COMPANY.

[47 SOUTH CAROLINA, 106.]

RAILROADS—LIABILITY FOR FAILURE TO GIVE SIGNALS—NEGLIGENCE—PROXIMATE OR EFFICIENT CAUSE.—Under a statute providing that, if the failure of a railroad company to give prescribed signals at crossings shall contribute to a personal injury, the company shall be liable therefor unless the party injured was guilty of gross negligence, it is not necessary to prove that the negligence of the company was the "proximate" or "efficient" cause of such injury in order to recover, when no gross negligence on the part of the party injured is charged.

APPELLATE PRACTICE—ERROR CANNOT BE BASED upon the failure of the trial court to define a statutory term, when no request to that effect was made.

APPELLATE PRACTICE—REFUSAL TO GIVE REQUESTED CHARGE.—The supreme court may consider on appeal whether the trial court has erred in refusing to charge a proposition of law because it was presented in a request alleged to have been framed in disregard of a technical requirement of a rule of court, provided such refusal was not based upon a failure to comply with such technical requirement.

The following are the requests to charge referred to in the opinion of the supreme court, and the remarks of the trial judge

thereon, so far as they relate to the questions involved in the case: "The third request of the defendant is as follows: 'That section 1692 makes any railroad company neglecting to give the signals required by the statute liable in damages for any injury to any person at the cross of a public road, provided that failure to give such signals was a proximate cause of the injury.' That request I shall have to modify by changing the word 'proximate,' so as to make it read that such failure to ring a bell, etc., contributed to the injury. . . . Now the sixth request of the plaintiff is as follows: 'By the term "traveled places," as used in the statute, is meant a place across which the public not only have been accustomed to travel, but where they have a right to travel; and if the jury find that the deceased was crossing at such a place, then he was entitled to the statutory signals.' That is correct; and, in connection with that, I will take up the defendant's fifth request: 'That in order to justify the jury in finding a verdict against the defendant, the plaintiff, the administrator, must prove by the preponderance of the evidence that the deceased was killed through collision with the defendant's locomotive; also, that the road over which deceased was crossing the track of the defendant was a public road, and that deceased was killed in crossing it. And further, that the statutory signals were not given; and further still, that the failure to give these signals caused the death of the deceased, that is to say, that if, under the circumstances proved in this case, the statutory signals had been given, the deceased would not have come to his death.' I cannot go as far as that request goes. The statute says: 'If the neglect to give such signals contributed to the injury'; and I have to modify that request in accordance with the statute; if the failure to give these signals contributed to death of the deceased, it might be sufficient. So modified, I charge you that request. . . . The tenth request of the defendant is as follows: 'That even if the jury find that the road referred to in the testimony was a public road, the mere fact that the bell was not rung or the whistle blown for at least five hundred yards from the crossing, and kept ringing or blowing until the locomotive passed the crossing, would not be sufficient proof of negligence, but that the plaintiff must prove, in addition to the failure to give these signals, that but for such failure the injury would not have occurred.' I cannot charge you that request, and I refuse it." The defendant appealed on the following exceptions: "1. That his honor, the presiding judge,

erred in refusing to charge the jury, as requested by defendant, 'that section 1692 makes any railroad company neglecting to give the signals required by the statute liable in damages for any injury to any person at the crossing of a public road, provided that failure to give such signals was a proximate cause of the injury.' 2. That his honor, the presiding judge, erred in modifying the said request to charge, by changing the word 'proximate,' so as to make it read, 'that such failure to ring a bell, etc., contributed to the injury,' without explaining to the jury the meaning of the word 'contributed.' 3. That his honor, the presiding judge, erred in refusing to charge, as requested by defendant, 'that plaintiff must prove, by the preponderance of the evidence,' that the statutory signals were not given, and, further, that the failure to give these signals caused the death of the deceased—that is to say, that if, under the circumstances proved in this case, the statutory signals had been given, the deceased would not have come to his death. 4. That his honor, the presiding judge, erred in modifying the said foregoing request, by changing the expression, 'that if, under the circumstances proved in this case, the statutory signals had been given, the deceased would not have come to his death,' into these words: 'If the neglect to give such signals contributed to the injury,' without explaining to the jury the meaning of the word 'contributed.' 5. That his honor, the presiding judge, erred in refusing to charge, as requested by defendant, 'that even if the jury find that the road referred to in the testimony was a public road, the mere fact that the bell was not rung, or the whistle blown, for at least five hundred yards from the crossing, and kept ringing or blowing until the locomotive passed the crossing, would not be sufficient proof of negligence, but that the plaintiff must prove, in addition to the failure to give these signals, that but for such failure the injury would not have occurred.' "

J. W. Barnwell and Lord & Burke, for the appellant.

Murphy, Farrow & Legare, for the appellee.

109 McIVER, C. J. The plaintiff, as administratrix of the personal estate of her deceased husband, brings this action to recover damages for the killing of her said husband by the defendant company's negligence. The allegation is, that the deceased was killed by a collision with the engine of said company, while attempting to cross the railroad track at a point where it was intersected by

a public road along which the deceased was traveling; and that such collision was caused by the failure of the defendant company to give the signals required by section 1685 of the Revised Statutes of 1893, when approaching such a crossing. At the outset of the case, the circuit judge ruled (to which ruling there was no exception) that the only cause of action set out in the complaint was the failure on the part of the defendant to give the signals required by the statute when approaching such a crossing, and the trial proceeded under that ruling. At the close of the testimony, his honor, Judge Aldrich, before whom the case was tried, charged the jury as is fully set out in the "case." The jury having rendered a verdict in favor of the plaintiff for the sum of twelve thousand five hundred dollars, a motion for a new trial on the minutes was made, and the circuit judge ordered a new trial, unless the plaintiff would remit all over the sum of six thousand and twenty dollars and fifty cents. The plaintiff entered a remittitur for such excess, and judgment having been entered for the balance after deducting the amount remitted, the defendant appealed, and served the exceptions set out in the record.

For a full understanding of the case, it will be necessary to set out in the report of the case a copy of the judge's charge, ¹¹⁰ in which he considers in detail the requests to charge, as well as the exceptions taken for the purpose of this appeal.

It seems to us that these exceptions present but two general questions: 1. Whether there was any error in refusing to charge as requested, that in order to render the defendant liable, the jury must conclude that the failure to give the required statutory signals was the "proximate" cause of the injury sustained; 2. Whether there was any error in omitting to explain to the jury the meaning of the term "contributed," as used in the statute, and in refusing to adopt the interpretation of that term, as suggested in the defendant's request to charge, because it went too far.

This being an action under section 1692 of the Revised Statutes 1893, it is proper to set out here the precise terms of the statute, which reads as follows: "If a person is injured in his person or property by collision with the engines or cars of a railroad corporation at a crossing, and it appears that the corporation neglected to give the signals required by this article, and that such neglect contributed to the injury, the corporation shall be liable for all damages caused by the collision, or

to a fine recoverable by indictment, unless it is shown that, in addition to a mere want of ordinary care, the person injured, or the person having charge of his person or property, was, at the time of the collision, guilty of gross or willful negligence, or was acting in violation of law, and that such gross or willful negligence or unlawful act contributed to the injury." Now it will be observed that there is nothing in the language found in this section calculated to convey the idea that the legislature intended to make the liability of the railroad company dependent upon the fact that the neglect to give the statutory signals was the proximate cause of the injury complained of, and, on the contrary, the language used implies no such intention. All that the statute requires is that the neglect to give the prescribed signals shall contribute to the injury; which, in our judgment, is a very different thing from saying that such neglect must be the proximate ¹¹¹ cause of the injury. In the case of *Thompson v. Richmond etc. R. R. Co.*, 24 S. C. 366, the action was to recover damages for the destruction, by fire, of certain property, under the allegation that such fire was communicated by sparks from the locomotive of the defendant company, and the action was based upon the provisions of section 1511 of the General Statutes of 1882, and it was held that, under the provisions of that section, the question as to proximate or remote cause was eliminated, and the only inquiry was whether the case fell within the terms of that section. As we said in that case: "Under the terms of the act, there can be no necessity for an inquiry as to whether the fire, caused by the act of the company or its agents, was the proximate or remote cause of the destruction of the property in question, as would have been the case under the old law; for it declares in absolute terms, without any qualifications, that the company shall be liable for the destruction of property by fire, which originated within the limits of the right of way from some act of the company, or its agents or employes; and this precludes any inquiry as to whether the fire so originating was the proximate or remote cause of the damage complained of." While it is true that the case just quoted from arose under a different section from that upon which the present action is based, yet, as it seems to us, the principle upon which that decision rests is applicable here. That principle is, that where a statute imposes a liability under certain conditions therein prescribed, the only question is whether such conditions are found to exist in a given case, and not whether, under the gen-

eral law, apart from the provisions of the statute, liability would accrue. Now, in the case under consideration, the question is, whether the conditions prescribed in section 1692 of the Revised Statutes, upon which this action is based, are found to exist. So that the first inquiry is, What are those conditions? and this is answered by the express terms of the statute, which declares that when a person is injured by collision with an engine of a railroad company at a crossing, and it appears that such company ¹¹² neglected to give the prescribed statutory signals, "and that such neglect contributed to the injury," the company shall be liable, except in certain cases which need not be specified here, as there is no pretense that such exceptions are applicable here. Now, under the express terms of this statute, the only inquiry, so far as the point we are now considering is concerned, is not whether the neglect to give such signals was the proximate cause of the injury, as might have been the case, apart from the provisions of this statute, but the inquiry is, in the language of the statute, whether "such neglect contributed to the injury."

The cases of *Glenn v. Columbia etc. R. R. Co.*, 21 S. C. 466, *Petrie v. Columbia etc. R. R. Co.*, 29 S. C. 303, and *Brown v. Laurens County*, 38 S. C. 282, cited by counsel for appellant, are not, in our judgment, in point. In *Glenn v. Columbia etc. R. R. Co.*, the negligence complained of was the failure to supply the engine with a headlight; and as it conclusively appeared, from the plaintiff's own testimony, that the absence of the headlight "had nothing to do with causing the injury," as stated in one part of the opinion, and in another place, "that the absence of the headlight in no way contributed toward causing the injury complained of," it was very clear that the plaintiff could not recover; for while there was evidence of negligence on the part of the railroad company, in failing to provide a headlight, there was no evidence tending to show that such negligence had anything whatever to do with causing the injury, and in no way contributed to such injury; for, as was pointedly said by that great jurist, Gibson, C. J., in *Hart v. Allen*, 2 Watts, 116, "the defendant is answerable for the consequences of negligence, and not for its abstract existence"; and hence such negligence must, in some way, be connected with the injury complained of. In that case, certainly, there is nothing to indicate that the court held that the negligence alleged must be the proximate cause of the injury complained of. So, too, in *Petrie v. Columbia etc. R. R. Co.*, 29 S. C. 303, the court, in passing upon the question

whether the motion for nonsuit was ¹¹³ properly refused, after affirming the rule as laid down in *Glenn v. Columbia etc. R. R. Co.*, 21 S. C. 466, proceeds "to inquire whether there was any evidence tending to show that the failure on the part of the defendant to give the signals required by statute in any way contributed to the injury complained of," and not a word was said indicating that it was necessary to show that such failure was the proximate cause of the injury complained of. As to the case of *Brown v. Laurens County*, 38 S. C. 282, it will be sufficient to say that the action there was not based upon any such statute as that upon which the present action is based, and hence what was said as to proximate cause does not apply here. We are of the opinion, therefore, that so much of the exceptions as impute error to the circuit judge in refusing to instruct the jury that to entitle the plaintiff to recover in this case they must be satisfied that the negligence imputed to the defendant was the proximate cause of the injury complained of must be overruled.

This brings us to the consideration of the second general question above stated. This question may be divided into two branches: 1. Whether the circuit judge erred in omitting to explain to the jury the meaning of the term "contributed," as used in the statute; 2. Whether the interpretation put upon that word in defendant's requests to charge was the correct interpretation. As to the first branch of this inquiry, it is sufficient to say that there was no request that the circuit judge should define or explain the meaning of the term "contributed" in his charge. So that the only real inquiry is, whether the circuit judge erred in refusing the request of defendant to charge the jury, as asked in one of the requests, that the plaintiff must not only prove that defendant failed to give the statutory signals, but must also show "that the failure to give these signals caused the death of the deceased; that is to say, that if, under the circumstances proved in this case, the statutory signals had been given, the deceased would not have come to his death." or ¹¹⁴ as was asked in another request, that the jury should be instructed that to enable the plaintiff to recover, she must prove, "in addition to the failure to give these signals, that but for such failure the injury would not have occurred." These two requests, though expressed in different phraseology, practically amount to the same thing, to wit, that the plaintiff could not recover unless the jury should conclude from the evidence, not only that defendant neglected to give the required statutory signals, but also that such neglect was the efficient cause of the

injury complained of. Now, it is quite certain that the statute does not contain any such language as that used in either request, but only requires that, as a condition precedent to defendant's liability, it shall be made to appear that the neglect to give the signals "contributed" to the injury complained of. So that the practicable inquiry is, whether this word, by which the legislature saw fit to express its intention should properly be interpreted to mean the same thing as that expressed by the words used in the request to charge. The well-settled rule is, that words used in a statute must be given their ordinary and popular signification, unless there is something in the statute requiring a different interpretation. As was held by this court, in *Akers v. Rowan*, 33 S. C. 470: "One of the primary rules in the construction of a statute is, that the words used therein should be taken in their ordinary and popular signification, unless there is something in the statute requiring a different interpretation: Cooley's Constitutional Limitations, 58, 59; Potter's Dwarrris on Statutes, 127, 622. This is really nothing more than a rule of common sense; for it must be supposed that the legislature, in enacting a statute, intended that the words used therein should be understood in the sense in which they are ordinarily and popularly understood by the people for whose guidance and government the law was enacted, unless there is something in the statute showing that the words in question were used in some other sense." Now, as it is apparent that there is nothing ¹¹⁵ in the statute here under consideration to indicate that the word "contributed" was used in any other than its ordinary and popular signification, the only inquiry is, What is such signification? This word is of frequent occurrence in the text-books and in the decided cases, where it most frequently appears in questions of contributory negligence. The foundation upon which the doctrine that contributory negligence on the part of the plaintiff will constitute a defense to an action to recover damages for an injury caused by the negligence of another, rests is, that when such injury may be partly the result of the defendant's negligence and partly the result of the plaintiff's own negligence, the court will not undertake to graduate or apportion the damages according to the contribution of either side, and will leave the parties as they found them, repels the idea that the word "contributed," or "contributory," ever has been understood to bear such an interpretation as that claimed for it by appellant. On the contrary, it seems to us that, in the ordinary and popular signification of the term, one thing is understood to contribute

to a given result, when such thing has some share or agency in producing such result, and is not understood to convey the idea that such thing was the efficient cause of such result, in the sense that, without it, such result would not have occurred; for it is possible such result may have occurred even in the absence of the thing which is supposed to have had some share or agency in producing such result. To apply this to the case in hand: it may have been possible that the disaster would have occurred even if there had been no neglect on the part of the defendant to give the signals, and yet if there was such neglect on the part of the defendant company, and such neglect contributed in any way to the disaster, in the sense that it had any share or agency in bringing about the disaster, the defendant, under the express terms of the statute, would still have been liable. It seems to us, therefore, that there was no error on the part of the circuit judge in instructing the jury in the express terms of ¹¹⁰ the statute, and no error in refusing to instruct the jury as requested by the defendant.

Having reached this conclusion, the position taken by the counsel for respondent, that none of the requests to charge could properly be considered, because not presented to the circuit judge in the form prescribed by the rules of court, becomes immaterial in the case, and, therefore, ordinarily, would not be considered. But as that position involves a question of practice, which it is important for the interests of the bar to settle, we will not decline to consider it now. This position is based upon the rule of the circuit court, which, amongst other things, requires counsel to note, on the margin opposite each request to charge, the authorities relied on to support the position of the law contained therein, and produce the same when required by the court. This position is conclusively disposed of by the fact that it nowhere appears that any such position was taken before the circuit judge, or that he was requested to make, or did make, any ruling upon the subject; and hence, under the well-settled rule, there is nothing before this court to review. Besides, it appears that the circuit judge, without objection either from counsel or from the court itself, so far as the "case" shows, did consider and dispose of each request; and, in the absence of any evidence to the contrary, we must assume that the requests were submitted in proper form. The point of the objection seems to be, that counsel for appellant failed to note, in the margin of his requests, the authorities upon which he relied; but, for all that

appears in the "case," no authorities were relied upon, and, if so, of course, none could be noted. At all events, it seems to us that this court would be going very far, much farther than we are disposed to go, to refuse to consider whether a circuit judge has erred in refusing to charge a proposition of law, simply because it was presented in a request alleged to have been framed in disregard of a technical requirement of a rule of the circuit court; especially when such refusal was not ¹¹⁷ based upon a failure to comply with such technical requirement.

The judgment of this court is that the judgment of the circuit court be affirmed.

IN THE SUBSEQUENT CASE of *Strother v. South Carolina etc. R. R. Co.*, 47 S. C. 375, the action was brought, under section 1686 and 1692 of the Revised Statutes of South Carolina, to recover for the death of a human being occurring while he was attempting to cross the defendant's railroad tracks on a public highway, and caused by the negligence of said company in striking him with one of its locomotives attached to a train of cars, and, in failing to give the statutory signals or ringing the bell or sounding the whistle of such locomotive as required by the statutes mentioned above, the substance of which is set out in the opinion in the principal case. In the case under consideration, the supreme court held that: "The failure on the part of the defendant's servants to ring the bell or sound the whistle in the manner provided by statute was negligence per se. When the defendant violates the requirements of the statutes as to ringing the bell or sounding the whistle, and a person is injured by its locomotive while crossing a highway, street, or traveled place, it will be presumed that such negligence caused the injury, unless the testimony shows that the injury was caused in some other manner." And the same court held, on the authority of the principal case, that in an action against a railroad company to recover for the death of a person under the statutes referred to above, it is not necessary to show that the failure to ring the bell or blow the whistle was the proximate cause of the killing, and a request to charge: "That if the evidence shows that the deceased heard or saw the train by which he was killed in time to have avoided the accident, you must find for the defendant," is erroneous, as it takes from the jury the question of the plaintiff's "gross or willful negligence": Citing *Wragge v. South Carolina etc. R. R. Co.*, 47 S. C. 105; ante, p. 870.

RAILROAD COMPANIES—DUTY TO GIVE SIGNALS—BREACH OF STATUTORY DUTY.—The duty of ringing the bell or blowing the whistle is a duty imposed for the protection of persons and livestock at crossings and depot grounds, and nowhere else, and it is negligence on the part of a railroad company to disregard duties imposed upon it by statute: Note to *Louisville etc. R. R. Co. v. Hall*, 13 Am. St. Rep. 94. The general rule is, that if a breach of a statute is relied upon by the plaintiff as a cause of action, he must show not only that he is one of the class for whose benefit the statute was created, but also that the breach of the statute is the proximate cause of the injury: Monographic note to *Gilson v. Delaware etc. Canal Co.*, 36 Am. St. Rep. 517. See, also, *Galena etc. R. R. Co. v. Loomis*, 13 Ill. 548; 56 Am. Dec. 471; *Philadelphia etc. R. R. Co. v. Hagan*, 47 Pa. St. 244; 86 Am. Dec. 541.

APPEAL.—QUESTIONS NOT RAISED IN TRIAL COURT.—An objection to the failure of the court to charge the jury upon a specific point cannot be raised for the first time by an assignment of error to the appellate court: *People v. Raher*, 92 Mich. 185; 31 Am. St. Rep. 575. See, also, *Coad v. Home Cattle Co.*, 32 Neb. 761; 29 Am. St. Rep. 465; *Fleming v. Fleming*, 83 S. C. 505; 26 Am. St. Rep. 694.

MIAMI POWDER COMPANY v. PORT ROYAL AND WESTERN CAROLINA RAILWAY COMPANY.

[47 SOUTH CAROLINA, 324.]

CARRIERS—FREIGHT—DAMAGES FOR FAILURE TO DELIVER.—The title to goods in the hands of a carrier is in the freighter or consignee, and, if the damage to that property by fault of the carrier while in his hands equals or exceeds the freight, the owner may sue the carrier for damages, or he may maintain an action for claim or delivery of the goods and for damages, without first paying the freight charges.

CARRIERS—CLAIM AND DELIVERY FOR DAMAGED GOODS—EVIDENCE.—In an action against a carrier for the possession of goods damaged while in his hands, evidence as to the condition of the goods for a considerable time after their arrival at their destination and up to the time of judgment is admissible.

The remarks of trial judge Benet in granting a nonsuit, referred to in the opinion of the supreme court, were as follows: "This is a motion for a nonsuit, upon the ground that there is no evidence that the plaintiff had fulfilled the condition precedent to the bringing of an action of this character, namely, that the consignee should first pay the freight charges before he can sue the common carrier for damages done to goods in transitu, and on the additional ground that there is no evidence that the powder was injured. This second ground I must overrule. While the proof of injury to the powder is meager and unsatisfactory, still, such as it is, it is a matter for the jury. Williams, the consignee, does testify that of the four hundred kegs of blasting powder in the consignment, a large portion, 'from one-third to one-half,' was badly damaged, and as to these damaged kegs, he says: 'I don't think I could have sold them for more than half price.' He describes the condition of the injured kegs as being very badly indented, and as being wet, and adds that a sharp indentation breaks the japanning on the sheet iron kegs; that japanning is intended to prevent rust and dampness; that if dampness gets to the powder, the powder cakes and gets like dust. It is true that he gives no positive testimony that the powder was actually injured, unless it be

where he says that 'strings of powder could be seen from the can to the platform.' All the rest of his testimony could only amount to a presumption that the powder inside the indented kegs may have been injured. If the case were to go to the jury, I should particularly direct their attention to the nature of his testimony, but I should properly leave it to them to say whether or not it was sufficient to satisfy them that the powder was really injured. That the kegs were wet; that they were very badly indented; that sharp indentation breaks the japanning; that kegs are japanned to prevent rust and keep out dampness; that dampness causes blasting powder to cake and get like dust; that the japanning on many of the kegs was broken; that he could not have sold the indented cans for more than half price—all this, as proof of injury to the powder, may simply amount to a very far-fetched and shadowy presumption arising out of very little and unsubstantial proof of fact; but sufficiency of proof is a question solely for the jury. The case will not go to the jury, however. The motion for a nonsuit must be granted on the other ground—namely, that the consignee, the plaintiff's agent, did not pay the freight charges before bringing his action. The plaintiff's witness, Williams, testifies that the freight bill for the powder was one hundred and thirty-seven dollars, and that it was not paid; that the railway agent refused to let him have any of the powder unless he first paid the freight; that he offered to take the uninjured powder, and pay the freight, but that the railway agent said: 'No; you must pay the freight on all before you can take it'; that as the freight was not paid, the consignment of powder was left in the depot; and that he does not know what became of the powder.

"The case of *Ewart v. Kerr, Rice*, 203, 2 McMull. 141, is relied on by plaintiff's counsel in resisting the motion. The old court of appeals, in the year 1839, did lay down the doctrine in that case that if the property of a freighter was damaged while in the care of the common carrier to an amount greater than, or equal to, the freight charges, the common carrier's lien for freight was extinguished, and the freighter or consignee not only had the right to demand the property without payment of freight, but, if delivery was refused, such retention amounted to a conversion, for which an action for trover would lie. This was the opinion of a divided court, two of the five justices not concurring, and one of the two—Judge Earle—filing a very strong dissenting opinion. The case was heard over fifty years

ago, in the early days of railroads. But even then the doctrine laid down was not in accord with the decisions of the courts of England and the rest of the United States, nor has it since received support elsewhere. I have been shown no decision of any court outside of this state holding similar doctrine. So far as I am aware, the invariable rule elsewhere is, that the freighter or consignee must first pay the freight charges, have the goods delivered to him, ascertain the damage he has suffered, and then bring his action. And that I must hold is now the rule in this state, since the decision of our present supreme court in the appeal taken in this case after the former trial: *Miami Powder Co. v. Port Royal etc. R. R. Co.*, 38 S. C. 78. Mr. Justice Pope, speaking for the court in that case, after recognizing the rule laid down in *Ewart v. Kerr*, Rice, 203, 2 McMull, 141, says: 'But we feel constrained to observe that the more recent decisions of the court of last resort in this state, notably the cases of *Shaw v. Railroad Co.*, 5 Rich. 462, 57 Am. Dec. 768, and *Nettles v. Railroad Co.*, 7 Rich. 190, 62 Am. Dec. 409, seem very clearly to point out the course of duty in a consignee, whose property is injured while in the control of the common carrier, to be to pay all freight charges and then sue the carrier for the injury done him.'

"What follows is peculiarly applicable to this case: 'As a practical result, we cannot see how the character and extent of injuries to goods can be correctly ascertained by the consignee while the same are in the hands of the common carrier, and hence this consignee is without the proof requisite to establish his claim for such damages.' It was almost impossible for Williams, the consignee, in this case, to adduce any evidence of injury. His testimony consisted almost entirely of presumptions based upon presumptions, and not of facts proved. If he had had the powder kegs in his possession, he would have been able to prove what was the extent of the injury. Following the doctrine announced by Mr. Justice Pope, I am clearly of the opinion that the plaintiff in this case must suffer a nonsuit, because the consignee failed to pay the freight charges before bringing his suit. It seems to me, both as matter of law and as common sense, that before suing for damages, the plaintiff should have paid the freight, obtained possession of the goods, and ascertained the extent of the injury, if any. To hold otherwise would subject the common carrier to all the trouble and inconvenience so well depicted by the learned associate justice, and end by compelling the common carrier to become a retail merchant in self-defense. The motion is granted

"Mr. Parker, for plaintiff, asked the court if he made any ruling that the damage did not exceed the freight charges—one hundred and thirty-seven dollars. The Court.—'No, for Williams stated that he did not think he could have sold the damaged kegs for more than half price. If the whole lot was worth eight hundred and sixty dollars, then a third or a half would exceed the freight bill.' Mr. Parker then asked if the ruling as to the nonsuit applied to both causes of action. The Court.—'Yes, Mr. Parker, from the nature of both causes of action, my ruling necessarily applies to both.' In accordance with the judge's rulings, a formal order of nonsuit was made.

"From this order plaintiff appeals on following exceptions:

"1. Because his honor erred in excluding the testimony of James T. Williams as to the condition of a certain part of the powder, and of the cans containing the same, when the same were exhibited in court by Major Ganahl, one of the counsel for defendant at a former trial of this cause.

"2. Because his honor erred in excluding the testimony of James T. Williams as to the condition of the powder, and the cans containing it, when the same were delivered to him for disposition three years after the institution of this suit, by agreement of counsel.

"3. Because his honor erred in granting the nonsuit in this cause, so far as such nonsuit affects the first cause of action, it being submitted that there was some testimony, sufficient to be submitted to the jury, to the effect that the goods had been damaged to an extent equal to or greater than the amount of the freight, and that after demand the defendant had refused to deliver the goods to the consignee, who was entitled to the possession thereof.

"4. Because his honor erred in holding that it was a prerequisite to an action by the consignee against a common carrier for the conversion of goods, that the consignee had paid the freight due on such goods, even though it appeared that such goods had been damaged in transportation to an amount greater than the amount due for freight.

"5. Because his honor erred in not holding that, if goods are damaged in transportation by a common carrier to an amount equal to or greater than the freight due, it amounts to a conversion of said goods, for which the common carrier can be held liable, if it refuses to deliver the goods to the consignee, upon demand therefor.

"6. Because his honor erred in ordering a nonsuit as to the second cause of action, it being submitted that there was some testimony, sufficient to submit to the jury, to the effect that there was damage to the goods in transportation caused by the common carrier."

Haynesworth & Parker, for the appellant.

M. F. Ansel and J. Ganahl, for the appellee.

³³⁰ JONES, J. This action, commenced in 1889, was first tried in 1891, and resulted in a verdict for the plaintiff for eight hundred and sixty dollars. On appeal, this verdict was set aside and a new trial ordered: *Miami Powder Co. v. Port Royal etc. Ry. Co.*, 38 S. C. 78. The case then came on to be heard before Judge Benet and a jury at November term, 1895. The plaintiff was nonsuited, and this appeal is from the order of nonsuit.

The complaint alleges two causes of action. The first cause is for damages, eight hundred and sixty dollars, the full value of four hundred kegs of powder, which defendant, as a common carrier, contracted with plaintiff to deliver to a consignee at Greenville, South Carolina, but was so negligent therein that said powder was wholly lost to plaintiff; also for one hundred dollars damages additional for delay and having to furnish other goods by reason of defendant's said negligence. The second cause of action was for the delivery of four hundred kegs of powder and for four hundred and thirty dollars damages for the negligent transportation thereof. It is conceded that one hundred and thirty-seven dollars is the amount of the freight charges for the transportation of the goods. Judge Benet, in his remarks granting the nonsuit, concedes that there was some evidence tending to show that the amount of damages exceeded the amount due for freight. The remarks of his honor granting the nonsuit should be incorporated in the report of the case, together with appellant's exceptions.

The principal question in this case is, whether a consignee or freighter must first pay the freight charges before he has any right to sue the common carrier for damages to the goods, or for the delivery of the goods and for ³³⁰ damages thereto, when the damages equal or exceed the freight. The order of nonsuit is based on the affirmative of this proposition. We think, upon reason and authority that the nonsuit cannot be sustained. There is no doubt that under our code, section 171, in an action by the carrier for the freight, the freighter may set off or coun-

to reclaim any loss or damage he may have sustained to his goods by the negligence of the carrier in the transportation or delivery. Under the old English practice this was not allowed, but the freighter was compelled to resort to a cross-action: *Bornman v. Tooke*, 1 Camp. 377; *Shields v. Davis*, 6 Taunt. 65. But this doctrine has been repudiated in America. It seems that in England now, under a comparatively recent statute, such a setoff is allowed in an action for the freight. It is stated in volume 8, page 977, of the *American and English Encyclopedia of Law* that "in the United States it is well settled that if the goods are damaged in a manner for which the carrier is liable, the owner may deduct the amount of injury from the freight, or he may recoup the amount of damage when sued for the freight." In *Redfield on Railways*, volume 2, page 188, it is stated in the text: "If the goods be damaged in a manner for which the carrier is liable, the owner may deduct the amount of injury from the freight," and in a note on the same page it is said: "The right of the owner of the goods to insist on any damage done to the goods, for which the carrier is liable, by way of recoupment or deduction from the freight, is well established in this country, and is a most elementary principle, as applicable to analogous cases." Our case of *Ewart v. Kerr, Rice*, 203, was one of the pioneers on this line, and the court's wisdom is being more and more vindicated. The freighter's right to set off his damages against the freight is the first logical step in the solution of the question. Undoubtedly, the carrier has a lien on the goods for the freight due upon the performance of its contract. In *Ewart v. Kerr, Rice*, 203, Judge O'Neill said: "The lien of the carrier is made exactly equal to his remedy by action." Thirty years later the Vermont³³¹ supreme court, in *Dyer v. Grand Trunk Ry. Co.*, 42 Vt. 441, 1 Am. Rep. 350, said: "The carrier's lien is, of course, only coextensive with his right to claim and recover freight." In the last case above, the supreme court of Vermont said: "It is fundamental in the law that the right of the carrier to have his freight results from the performance on his part of the contract, in virtue of which he undertakes and proceeds in the carriage of the property. If they fail to carry and have ready for delivery, they could not maintain a claim for freight. If in the carriage they should subject themselves to liability for damage to the consignee in respect to the property carried, that would disentitle, to the extent of such liability, to demand and recover freight. And if damage should exceed the amount of the

freight to which they would otherwise be entitled, of course, they would not be entitled to demand and recover anything for the carriage of the property. Such seems to be the result of unquestioned principles and of the decided cases bearing upon the subject." This case distinctly holds that where the carrier, by delay in transporting and delivering goods, has injured the consignee to an amount equal to the charge for freight, that the carrier's lien ceases, and the consignee may maintain replevin for the goods without paying or tendering the freight. In 8 American and English Encyclopedia of Law, page 969, it is laid down that the carrier's lien is coextensive with its right to recover freight; and, same volume, page 977, if the damage equal the freight, the carrier's lien is gone—citing our case of *Ewart v. Kerr, Rice*, 203, and the Vermont case, *supra*, and other cases. *Ewart v. Kerr, Rice*, 203, though decided in 1839 by a divided court, was again before the court in 1840, and the doctrine announced in the former decision was reaffirmed: *Ewart v. Kerr*, 2 McMull. 143. This case expressly rules that the carrier's lien for freight is only coextensive with his legal right of action for freight, and may be defeated where the damage done to the goods, by the fault of the carrier, equals or exceeds the freight, that in such case the freighter may maintain trover against the carrier for the goods detained under ³³² the supposed lien for freight. This case has never been expressly overruled, but it is argued that this court, in *Miami Powder Co. v. Port Royal etc. Ry. Co.*, 38 S. C. 78, announced principles in conflict with it; Mr. Justice Pope delivering the opinion in this case, said, after stating plaintiff's contention: "This court is relieved of an extended consideration of these propositions of law, because this precise point was considered by the court of appeals years ago, in the case of *Ewart v. Kerr, Rice*, 203, 2 McMull. 141, and in that case it was decided by a divided court that if the property of plaintiff was damaged, while in the care of the common carrier, to a greater extent than the bill of freight, the lien of the latter was extinguished, and the consignee not only had the right to demand the property of the carrier without payment of freight charges, but that such retention by the common carrier after the demand made amounted to a conversion, and that an action of trover would lie. It must be observed that, in order for the principle established in *Ewart v. Kerr, Rice*, 203, 2 McMull. 141, to apply, the damage to the property, while in the hands of the common carrier, must be equal to or greater than the freight

charges. There is no evidence establishing this fact in the case at bar, and the charge of the circuit judge, in response to the request to charge of the defendant, appellant, failed to place this essential element before the jury." It is obvious from the above quotation that the court did not only not overrule, but distinctly reaffirmed the doctrine of *Ewart v. Kerr, Rice*, 203; 2 McMull. 141. It is true, and without attempting to explain by hair-splitting distinctions, we frankly confess that there follow the above quotation expressions that may mislead as to the opinion of the court concerning *Ewart v. Kerr, Rice*, 203, 2 McMull. 141, as authority. These expressions, quoted as tending to impeach the doctrine established in *Ewart v. Kerr, Rice*, 203, 2 McMull. 141, must be taken, and were meant to be taken, as words of caution merely, in view of the practical difficulties in the way of establishing the facts necessary to be established in the application of that doctrine. As a general rule, it is wisest and safest for ^{the} ~~the~~ freighter to pay the freight and then sue for damages, since the possession of the goods by the consignee would earliest put the goods to their designed use, would tend to diminish the injury arising from the detention for that use, and especially would afford the consignee better means of ascertaining the amount of damage already done; but this is a rule of caution and not a rule of law. The case of *Shaw v. South Carolina R. R. Co.*, 5 Rich. 462, 57 Am. Dec. 768, decides what is the rule of measurement of damages in a case where the goods in the carrier's possession are not injured in quality, but deficient simply in quantity. In this case ten barrels of molasses were shipped to the consignee in Camden, who received eight of the barrels, and declined to receive the other two, because some thirty gallons, worth eight dollars and forty cents, had leaked out. The court decided, under these circumstances, that the owner could not abandon the two barrels, and recover their entire value; that he could only recover the price at the place of delivery of the goods actually lost. The value of the goods actually lost being only eight dollars and forty cents, the case was dismissed for want of jurisdiction, not because the owner refused to receive the goods on tender by the carrier. We have no doubt that if the damages proven had been an amount within the jurisdiction of the court, recovery would have been allowed for that amount. In the case of *Nettles v. South Carolina R. R. Co.*, 7 Rich. 190, 62 Am. Dec. 409, there is nothing inconsistent with the doctrine of *Ewart v. Kerr, Rice*,

203; 2 McMull. 141. This case was a suit for one hundred and twenty dollars damages for nondelivery, within a reasonable time, of two cases of wool hats, the original cost of which was ninety dollars, upon which plaintiff proved he could have realized a profit of thirty dollars. The goods ought to have been delivered in May, whereas they were tendered in September. The jury were told by Judge O'Neill that the plaintiff ought to have received them on tender in September, and claimed damages which he had sustained for their nondelivery in time. The jury found a verdict for one hundred dollars. The appeal court said: "When they [the goods] were tendered to him, he should have accepted them, and thereby the extreme measure of ³²⁴ damages would have been reduced by deduction therefrom of the value of the goods according to their condition at the time and place of tender"; and further said: "It would have been more satisfactory, if by accepting the goods the plaintiff had been enabled to show exactly the deterioration they had sustained." But it is not intimated in either of the cases last mentioned that payment of the freight and receipt of the goods is essential to maintain an action by the owner for damages thereto by fault of the carrier. On the contrary, so far as the Nettles case shows, no freight was tendered by him for the goods, and he refused the goods when tendered apparently without demand for freight, yet the verdict was sustained. If it had been a rule of law for the freighter to first pay the freight and receive the goods before suing for damages, it is impossible that the verdict in this case could have been sustained. The title to the goods in the hands of the carrier is in the freighter or consignee, and it follows that for damage to that property by fault of the carrier, the owner may sue the carrier for damages, even though the property be held by the carrier for the payment of freight thereon, when the damages equal or exceed the freight, in which case the freight charges may go to cancel or diminish the damages. When the damage equals or exceeds the freight, the carrier's lien for freight is gone, and the owner's right of possession of his property is complete, and he may maintain an action of claim and delivery for the property and for damage. The carrier thus loses no right; he either holds the goods under his claim for freight or he is protected by the bond given by the plaintiff for the return of the property, in the event he fails in his action; while, on the other hand, nothing would protect the freighter against his loss in the event of insolvency of the car-

rier, if the freighter were compelled first to pay freight before suing for damages. It follows, from these conclusions, that the circuit court erred in granting the nonsuit on either or both causes of action.

We think, also, there was error in refusing to allow evidence ³³⁵ as to the condition of the powder some considerable length of time after its arrival in Greenville. The evidence was competent for whatever it was worth, on the question of damages sustained at the time the powder was tendered by the carrier upon condition of payment of freight. Whether the jury could infer what was the condition of the powder at that time, by its condition at a later time, would depend upon the facts and circumstances of the case. The sufficiency of the evidence was wholly for the jury. It is clear that it would be competent for the defendant to exhibit to the jury the powder at any time of trial for the purpose of showing that it was not damaged then, from which the jury could infer that necessarily it was not damaged at the time of tender. For a like reason, the plaintiffs may show the condition of the powder at any time before trial, as a means, however weak may be the force of the evidence, of showing its condition at the time of tender. Besides, if there is evidence tending to show that the powder was damaged at the time of tender, to an amount equal to or exceeding the freight, then it becomes relevant, in an action for claim and delivery and for damages, to show the condition of the powder at any time before judgment; because, if the damage at the time of tender exceeded the freight, the detention of the goods by the carrier was unlawful, and damage resulting from that unlawful detention becomes relevant.

It is the judgment of this court that the judgment of the circuit court be reversed, and that the cause be remanded to the circuit court for a new trial.

CARRIERS—LIEN FOR FREIGHT—DAMAGE TO GOODS.—A carrier's lien on goods transported is only coextensive with his right to claim and recover freight. Therefore, where carriers have by delay in transporting and delivering goods, injured the consignee to an amount equal to their charges for freight, their lien ceases, and the consignee may maintain replevin for goods without paying or tendering the freight: *Dyer v. Grand Trunk Ry. Co.*, 42 Vt. 441; 1 Am. Rep. 350. According to the English cases, if the goods are actually carried and delivered, but have suffered damage and deterioration by the master's fault, even so as to be absolutely worthless, or so as to be worth less than the freight, the owner cannot resist the claim for freight, but must resort to a cross-action. In this country, the general rule is, that the owner or consignee of the goods receiv-

ing them may set off or recoup damages due to the carrier's fault in an action for the freight: Monographic note to Crawford v. Williams, 60 Am. Dec. 153. See, also, Grand Rapids etc. R. R. Co. v. Diether, 10 Ind. App. 206; 53 Am. St. Rep. 385, and note.

CARRIERS—DAMAGE TO GOODS—EVIDENCE.—Evidence tending to show that "breakage" complained of did not result from plaintiff's negligence in an action by a carrier for freight is admissible on behalf of the plaintiff: Steele v. Townsend, 37 Ala. 247; 79 Am. Dec. 49. See, also, Peixotti v. McLaughlin, 1 Strob. 468; 47 Am. Dec. 563; Dibble v. Brown, 12 Ga. 217; 56 Am. Dec. 460.

TOBIN v. CHESTER AND LENOIR NARROW GAUGE RAILROAD COMPANY.

[47 SOUTH CAROLINA, 387.]

CORPORATIONS—RAILROADS—RESIDENCE.—A railroad company is a resident of the county or counties wherein its lines are located and in which it maintains a public office for the transaction of business, and an agent upon whom process may be served, within the meaning of a statute providing that an action to recover for an injury to personal property shall be tried in the county in which the defendant resides at the time of the commencement of the action.

Bellinger, Townsend & O'Bannon, for the appellant.

A. G. Brice, for the appellee.

387 JONES, J. This is an appeal from an order transferring this case from the court of common pleas for Barnwell county to that of Chester county. The action was commenced in Barnwell by service of summons and complaint on the defendant at Chester, South Carolina, to recover ³⁸⁸ damages for alleged injury to plaintiff's cow, while in course of transportation over the line of the defendant company and in connecting lines, from Gathriesville, in York county, to Barnwell, South Carolina. The defendant is a domestic railway corporation under the laws of this state, its only line of railroad in this state lying in Chester and York counties, where its agencies are established and its business carried on, having its principal office in Chester county. It has no property and no agency in Barnwell county. His honor, James Aldrich, the presiding judge, held that the court was without jurisdiction to try the action, for the reason that the defendant was not a resident of the county of Barnwell within the meaning of section 146 of the Code of Civil Procedure, and, therefore, transferred the case for trial to Chester county. Appellant appeals upon the following grounds: "1.

That his honor, the presiding judge, erred in holding that the court of common pleas for Barnwell county was without jurisdiction to try this cause, for the reason that the defendant was not a resident of the county of Barnwell, whereas he should have held that the defendant being a domestic railway corporation, organized under the laws of this state, its residence was only limited by the limits of the jurisdiction of the state creating it, and that said defendant was liable to be sued as a resident of any county within this state." Section 146 of our code provides that actions of this character, injury to personal property, shall be tried in the county in which the defendant resides at the time of the commencement of the action. We have no statute expressly providing for the place of trial of such actions against domestic corporations. Section 1543 of the Revised Statutes of 1893, providing that a railroad corporation incorporated in this state "may sue and be sued, etc., in any court of law or equity in this state, etc.," has no reference to the place of trial. Where, then, is the residence of a domestic railroad corporation in this state? The case of *Bristol v. Chicago etc. R. R. Co.*, 15 Ill. 437, very strongly states the answer as follows: "The residence of a corporation, if it can be said ³⁸⁹ to have a residence, is necessarily where it exercises corporate functions. It dwells in the place where its business is done. It is located where its franchises are exercised. It is present where it is engaged in the prosecution of the corporate enterprise. This corporation has a legal residence in any county in which it operates the road, or exercises corporate powers and privileges. In legal contemplation, it resides in the counties through which its road passes and in which it transacts its business." To the same effect, see *Davis v. Central R. R. etc. Co.*, 17 Ga. 323; *Slavens v. South Pac. R. R. Co.*, 51 Mo. 308. This last-named case decides that "the residence of a railroad corporation is in any county through which its line of road passes, and in which it has an agent upon whom process can be served." There is another line of cases which hold that, in the absence of statutory regulation, the residence of a railroad corporation is where its principal office is located: *Connecticut etc. R. R. Co. v. Cooper*, 30 Vt. 476; 73 Am. Dec. 319; *Thorn v. Central R. R. Co.*, 26 N. J. L. 121; *Western Transp. Co. v. Scheu*, 19 N. Y. 408; *Pelton v. Transportation Co.*, 37 Ohio St. 450; *Jenkins v. California Stage Co.*, 22 Cal. 538; *Galveston etc. R. R. Co. v. Gonzales*, 151 U. S. 496. In the case of *Cromwell v. Charleston Ins. Co.*, 2 Rich. 512, it was held that a corporation has its place of legal residence

wherever its corporate business is done. Judge Butler, delivering the opinion of the court, said: "I take it that residence is a place of legal abode, in its legislative meaning. A corporation must have some abiding place of local definiteness. Is there anything out of the way in saying where a bank resides? We all understand the import of words, 'where is a bank or other corporation situated?' It is situated where it is in the habit of doing its business." In the case of *Glaize v. South Carolina R. R. Co.*, 1 Strob. 70, the court held that the legal residence of a corporation is not confined to the locality of its principal office of business. Accordingly, the court refused to set aside a writ in *assumpsit* served upon the president of the company at Columbia, and returnable to Richland county, notwithstanding the president resided ³⁹⁰ in Charleston, and the company had its principal office in Charleston. The company had an office in Columbia, and a part of its line was in Richland county. The court, among other things, said: "The residence of the company, if a local residence can be affirmed of it, is most obviously where it is actively present in the operations of its enterprise." There are some expressions in the opinion that seem to sustain the appellant's contention, but they were not necessary to a decision of the point before the court. The contest was whether the service of a writ should be set aside because the service was made, and the writ was returnable, in Richland, where the company did business and had an office, instead of in Charleston county, where the principal office was located.

Our conclusion is, that a railroad corporation, under the laws of this state, is, within the meaning of section 146 of the code, a resident of the county or counties where its line is located, and where it maintains a public office for the transaction of its business, and an agent upon whom process may be served.

The judgment of the circuit court is affirmed.

CORPORATIONS—RAILROAD—RESIDENCE.—The residence of a corporation is within the state creating it, and at the place where its principal office or place of business is: *Connecticut etc. R. R. Co. v. Cooper*, 30 Vt. 476; 73 Am. Dec. 319; *Duke v. Taylor*, 37 Fla. 64; 53 Am. St. Rep. 232, and note. The residence of a railway company is limited to the range of the legally defined route of the road, where the charter fixes no locality: *Connecticut etc. R. R. Co. v. Cooper*, 30 Vt. 476; 73 Am. Dec. 319. A railroad company has no residence in a county through which its road and trains pass, and in which its trains stop only temporarily to receive and discharge freight and passengers: *Sangamon etc. R. R. Co. v. Morgan Co.*, 14 Ill. 163; 56 Am. Dec. 497. The contrary has, however, been held: *Extended note to Wood v. Hartford Fire Ins. Co.*, 33 Am. Dec. 400.

TEAM v. BAUM.

[47 SOUTH CAROLINA, 410.]

A MORTGAGE OF REAL PROPERTY DOES NOT CONVEY THE LEGAL TITLE, though it contains a power of sale, unless such power is exercised while the mortgagor remains the owner of such legal title.

MORTGAGE—POWER OF SALE, EFFECT UPON OF CONVEYANCE BY MORTGAGOR.—If, after executing a mortgage containing a power of sale, the mortgagor conveys the property to a third person a sale made under the power is inoperative, because it is in substance a sale by the mortgagor, who has already parted with his entire title. The only remedy of the mortgagee is by suit to foreclose.

The decree of the trial court, as well as the exceptions thereto mentioned in the opinion of the supreme court, were as follows: "The complaint in this action seeks to recover the possession of a certain tract of land situate in Kershaw county. By a consent order, the issues of law and fact were referred to T. J. Kirkland, Esq., as special master, to report thereon to the court. After plaintiff had developed his case, a motion was made to dismiss the complaint by defendant's counsel. The special master has filed his report dismissing the complaint, in which his reasons are clearly and tersely stated. The case was heard by me at the February term, 1896, of the court of common pleas for Kershaw county upon exceptions to the report of the special master. The facts as found by the master are as follows: On the sixteenth day of November, 1893, J. B. Nelson executed to B. G. Team a mortgage of the premises described in the complaint, with a power in said mortgage authorizing and empowering the said B. G. Team to sell said premises in case of nonpayment of the debt secured by said mortgage after it matured. This mortgage was regularly recorded in the proper office on the 13th of December, 1893. On the twenty-eighth day of November, 1893 (subsequent to the execution of said mortgage), the said J. B. Nelson executed an absolute deed of conveyance, conveying the same tract of land to the defendant, M. Baum, as trustee, in satisfaction of a prior mortgage debt thereon held by said Baum. On the first Monday in February, 1894, under the power contained in said mortgage, the said B. G. Team, at public outcry, sold the land in the regular way, at which sale the same was bid off by the plaintiff, Mrs. T. R. Team, for the sum of five dollars, and a conveyance thereof was executed to her in the name of the mortgagor, J. B. Nelson, by the mortgagee,

B. G. Team, his attorney in fact, on the seventh day of February, 1894. It should have been stated that the defendant, Baum, trustee, went into possession of the premises immediately upon the execution of the deed, and was in possession at the commencement of this action, and is still in possession of the same. The exceptions raised the question of law, In whom is the fee simple title to the land in dispute. Or, in other words, did the sale under the power contained in the mortgage executed to B. G. Team have the effect to convey such a title as would defeat the formal deed of conveyance executed by the mortgagor, J. B. Nelson, prior to the sale under the power? I agree with the special master that it did not. It will not be questioned that in this state the execution of the mortgage to Team, even with the power of sale, did not have the effect of passing the title to the land out of Nelson. The fee was still in him, and, this being the case, he could convey the same by his deed, which he did in this case to defendant, Baum. Baum then went into possession of the premises as the owner in fee, subject to the lien of Team's mortgage. Did the sale under the power have the effect of defeating this title? I think not. The point turns upon the principle of principal and agent. Team was the agent of Nelson, with no greater power than Nelson had. As long as the fee was in Nelson, his agent, Team, could convey. But the moment the fee passed out of Nelson, there was nothing upon which the power could operate. As stated in the case of *Johnson v. Johnson*, 27 S. C. 309, 13 Am. St. Rep. 636; if the mortgagor die before the sale is made under the power, the power becomes inoperative, for the reason that the title has passed out of the mortgagor by operation of law. The statute of distribution passes the title to his next of kin, heirs at law. At the death of the parties, the status of title is changed by operation of law. And in this instance the status is changed by the act of the party. He certainly would be permitted to do while alive that which the statute would do for him if dead. By his death, his heirs at law could acquire no greater interest than he had while living.

"It is contended, however, that this is a power coupled with an interest, and is not revocable by the act of the party creating the power. In *Johnson v. Johnson*, 27 S. C. 309, the supreme court decided that such was not a power coupled with an interest. The power is not revoked by the deed, but, as was said above, there is nothing upon which it can operate, the fee having passed

out of the mortgagor. Besides, the defendant, Baum, certainly has some equity in the case, and to hold that the mortgagee, by a sale under the power, could convey such a title as to defeat the rights of Baum, would be giving to such power more force than a decree in equity could give. Even the court of equity, if Team went into the court to have his rights determined, could not order a sale that would defeat Baum's equity, unless he was a party to the suit. And yet to sustain this title under the power would have that effect. It is, therefore, ordered, that the report of the special master be confirmed, and the exceptions thereto overruled.

"The plaintiff appeals on the following grounds: 1. That his honor erred in holding that the sale and conveyance under the power of sale in the mortgage did not vest such title in the plaintiff as would sustain this action; 2. That his honor erred in holding that such sale and conveyance did not divest the title of M. Baum, trustee, derived from J. B. Nelson, the mortgagor; 3. That his honor erred in holding that if the conveyance by Nelson to Baum, trustee, operated to defeat the power to sell, the same was a revocation of the power; 4. That his honor erred in holding that what is done by operation of law, can be done by act of the parties; 5. That his honor erred in overruling the exceptions of plaintiff, and in sustaining the report of the special master."

J. T. Hay and B. B. Clarke, for the appellant.

W. M. Shannon, for the appellee.

⁴¹³ McIVER, C. J. This was an action to recover possession of real estate, and by consent order it was referred to T. J. Kirkland, Esq., as special master, to hear and determine all the issues in the action. The special master took the testimony, which is set out in the "case," and made his report, finding that the complaint should be dismissed. To this report the plaintiff excepted, and the case was heard by his honor, Judge Ernest Gary, upon this report and the exceptions thereto, who rendered a decree overruling the exceptions and confirming the report of the special master. From this judgment plaintiff appeals upon the several grounds set out in the record; which decree, with the exceptions thereto, should be incorporated in the report of this case.

The facts of the case are undisputed, and may be briefly ⁴¹⁴ stated as follows: On the 16th of November, 1893, one J. B.

Nelson, then being the owner of the land in controversy, executed a mortgage on the same to one B. G. Team, which mortgage was duly recorded on the 13th of December, 1893. This mortgage contained the usual power of sale, authorizing the said B. G. Team to sell the mortgaged premises upon default in payment of the debt secured thereby. In the exercise of this power, the said B. G. Team, on the seventh day of February, 1894, offered the premises for sale at public outcry, and the same were bid off by Mrs. T. R. Team, the plaintiff, for the sum of five dollars, and she having complied with the terms of the sale, the property on the same day was conveyed to her by the mortgagor, Nelson, through his attorney in fact, B. G. Team. In the mean time, however, to wit, on the 28th of November, 1893, the land in question was duly conveyed to the defendant, Baum, as trustee, by said J. B. Nelson, in satisfaction of a prior mortgage held by said Baum, and the said Baum, through his tenant, immediately went into possession of the said premises, and still retains the same. From this state of facts the question arises, in whom was the legal title to the land at the time of the commencement of this action, or, as the circuit judge expresses it, the practical inquiry is: "Did the sale under the power contained in the mortgage executed to B. G. Team have the effect to convey such a title as would defeat the formal deed of conveyance executed by the mortgagor, J. B. Nelson, prior to the sale under the power?" We agree entirely with the view taken both by the special master and the circuit judge, that the legal title was and still is in the defendant, Baum, and hence there was no error in dismissing the complaint.

It is somewhat difficult to add anything to what has been so well said by the circuit judge in vindication of his conclusion. It is conceded by both parties that the legal title was originally in J. B. Nelson, and the test is to inquire, When and to whom did such legal title first pass from Nelson? Since the act of 1791, which has been construed in ⁴¹⁵ so many cases—amongst the more recent of which are the cases of *Simons v. Bryce*, 10 S. C. 354, and *Warren v. Raymond*, 12 S. C. 9—it is quite certain that the legal title did not pass from Nelson by his mortgage to B. G. Team, even though that mortgage contained a power of sale; for, as was said in *Warren v. Raymond*, 12 S. C. 25, in considering the question when a mortgage on real estate would operate as an alienation: "The fact that the mortgage contains a power of sale in case of default

is unimportant; it must appear that such power of sale has been effectually exercised in order to produce that result." From this it follows that a mortgage, even though it contains a power of sale, does not pass the legal title until such power is exercised; and as the undisputed fact in this case is that the power of sale was not exercised until after the legal title had passed from Nelson into Baum by his absolute conveyance, the inevitable consequence is that the legal title to the premises in question is in Baum—subject, of course, to any lien thereon which the mortgage to B. G. Team may give to the holder thereof; and hence B. G. Team's remedy, if he has any, is by a proceeding to foreclose his mortgage, and not by any attempted sale of all the right, title, and interest of said Nelson in the premises, on the 7th of February, 1894, after all such right, title, and interest had previously passed out of Nelson into Baum by the absolute conveyance thereof to Baum by Nelson on the 28th of November 1893.

There can be no doubt that if a mortgagor, while still retaining the legal title, as he unquestionably does, under the act of 1791, should make an absolute conveyance of the mortgaged premises to a third person, and afterward undertake to convey the same premises to another, the title of the latter would be subordinate to that of the former. If so, we are unable to perceive why the result should be different, where the second conveyance, instead of being made directly by the mortgagor, is made by his attorney in fact under a power of sale contained in the mortgage; for to so hold would be to attribute to the agent greater ⁴¹⁶ power than that possessed by the principal. These views, in addition to those presented by the circuit judge in his decree, which need not be repeated here, are, as it seems to us, conclusive of the question we are called upon to determine.

It only remains to consider the cases cited by appellant's counsel. The first of these cases is *Mitchell v. Bogan*, 11 Rich. 686, in which a remark made by O'Neill, J., in his report of the trial on circuit, is cited for the purpose of showing that that great judge would have sustained the title of the plaintiff in this case. But besides the fact that such remark was made by the circuit judge in his report of the case for the appeal court, and could not, therefore, have the force of law, it is very obvious from the language used by Judge O'Neill in the paragraph immediately preceding that from which the quotation relied upon is taken that he did not intend to express any such idea as that

attributed to him by counsel for appellant. His entire language was as follows: "I thought, as the mortgagor was out of possession, and a third person was in the possession, that the mortgagee might maintain trespass to try titles. I did not rely at all on the plaintiff's sale and purchase, inasmuch as he bought himself. But if he had sold and conveyed to a third person, under the power in his mortgage, I should have held such sale and conveyance good." Inasmuch as it did not appear when the deed to Williams was delivered, whether before or after the sale to Bogan under the power contained in the mortgage, it is manifest that Judge O'Neill could not have intended, even by such passing remark, to convey the idea attributed to him by counsel for appellant. But inasmuch as it did appear that the deed was not delivered until after the mortgage was executed, and inasmuch as, under the law as it then stood, a mortgage operated as a transfer of the legal title where the mortgagor was out of possession, as was the fact in that case, it was held not only by Judge O'Neill, but by the court of appeals also, that the mortgagee held the superior legal title. It is ⁴¹⁷ clear, from an examination of that case, that no such question as that presented here was either decided or considered in that case. So, also, in the case of *Dendy v. Walte*, 36 S. C. 569, no such question as that presented here was either decided or considered. The case seems to have been cited for the purpose of introducing a quotation from certain language used in that opinion, which is itself a quotation from the previous case of *Robinson v. Amateur Assn.*, 14 S. C. 152. The language quoted is as follows: "A sale under such a power is equivalent to a sale and purchase under a decree in equity, and will cut off all right of redemption, provided the mortgagee faithfully discharge, in all respects, the duties imposed upon him as donee of the power." The purpose of this language, as used in both of those cases, was simply to recognize the right of a mortgagee to sell lands under a power contained in a mortgage, provided he follows strictly the duties imposed upon him as the donee of such a power. The object in creating such a power is to enable the mortgagee to sell all the right, title, and interest of the mortgagor in the mortgaged premises; but if the mortgagor, before such power is exercised, divests himself, by a legal conveyance, of all his right, title, and interest in the mortgaged premises, as he unquestionably has a right to do, there is nothing left upon which such power can be exercised, and any attempted

exercise of it becomes utterly nugatory. In such a case, the only remedy left for the mortgagee is to invoke the aid of the court of equity, which, by bringing in the purchaser from the mortgagor as a party, may enforce the lien of the mortgage by a sale of the mortgaged premises, and protect the rights of all parties concerned. It seems to us, therefore, that in no view of this case was there any error on the part of the circuit judge.

The judgment of this court is, that the judgment of the circuit court be affirmed.

MORTGAGE—TITLE TO MORTGAGED PREMISES—POWER OF SALE.—A mortgage giving power to the mortgagee to sell the mortgaged premises does not convey to him the legal title thereto. The title remains in the mortgagor, and any sale or conveyance thereof must be in his name: *Johnson v. Johnson*, 27 S. C. 309; 13 Am. St. Rep. 636, and note. The title of a mortgagee in fee is in the nature of a base or determinable fee. The term of its existence is measured by the mortgage debt; when that is paid off or becomes barred by the statute of limitations, the mortgagee's title is extinguished by operation of law: *Barrett v. Hinckley*, 124 Ill. 32; 7 Am. St. Rep. 331. The nature of the mortgagor's estate is discussed in the extended note to *Cotton v. Carlsile*, 7 Am. St. Rep. 31-34. See, also, note to *Wilson v. Troup*, 14 Am. Dec. 473-475.

MORTGAGE—POWER OF SALE—CONSTRUCTION OF.—A power of sale in a mortgage conferred on the mortgagee is a power coupled with an interest and passes to the executors, administrators, and assigns, and is not lost by the death or insanity of the mortgagor: *Barrick v. Horner*, 78 Md. 253; 44 Am. St. Rep. 283, and note. A different rule is held to in South Carolina: *Johnson v. Johnson*, 27 S. C. 309; 13 Am. St. Rep. 636, and note.

FARMERS' MUTUAL ASSOCIATION v. BURCH.

[47 SOUTH CAROLINA, 453.]

HOMESTEADS—INSURANCE UPON—LIEN OF INSURER.

A member of a mutual fire insurance company whose charter provides that the insured building and the right, title, and interest of the insured to the lands on which it stands shall be pledged to the company, which shall have a lien upon such property for all debts or liabilities contracted or incurred by such company during the continuance of such insurance, cannot, in an action to recover his pro rata of losses sustained by the company, plead his homestead exemption as to land upon which his insured building stands, and all of such property may be sold to pay such losses.

INSURANCE—PLEDGE OF PROPERTY INSURED—MORTGAGE.—A pledge of insured property in a mutual fire insurance association as security for the payment of the debts and liabilities of such association, is a mortgage within the meaning of a statute restricting the modes of defeating a homestead to alienation or mortgage of the property.

Following is so much of the policy sued on as is essential, together with the report and decree of the judge of the circuit

court and the exceptions on appeal mentioned in the opinion in the principal case:

"This agreement, this day entered into between Thomas S. Burch, of Florence, S. C. (who is called the insured), and the Farmers' Mutual Insurance Association of Florence county, whereby it is agreed:

"1. That the insured shall bear his pro rata portion of all expenses and losses sustained by the members of this association, on account of loss or damage of property that has been assigned to this association, by fire, lightning, or wind storm of any description; likewise, the said association shall pay to the insured, within thirty days after the treasurer has given notice of assessment, all damages to the property described below (provided, the amount of insurance herein specified shall equal such loss) by fire, lightning, or wind storm of any description. . . . 5. This policy shall remain in force until such a time as it may be canceled either by the insured or the association, as provided in this policy or the by-laws of the association. . . .

"In consideration of the above, the insured does, on the first day of January, in the year 1895, at 12 o'clock, become a member of said company, assigning to the same the following described property: One frame shingle roof one-story dwelling-house, situated upon the following described real estate, to wit, all that tract of land, in county and state aforesaid, containing 77½ acres, bounded on the north by lands of estate Sarah W. Kennedy, east by lands of Mrs. M. D. Burch, south by lands of Mrs. M. D. Burch, and west by lands of Mrs. S. J. Harrell, five hundred dollars. Three bedroom sets and one set of parlor furniture, stove and kitchen furniture, being in and upon the house and premises as above described, \$100. One frame barn and contents, situated upon the above described premises, \$100. Dated this 1st day of January, A. D. 1895." (Duly signed by insured and officers of company.)

Decree and report of Buchanan, circuit judge: "This cause came on before me at chambers, under an agreement of counsel filed in the cause, on the amended pleadings. All the facts alleged in the amended complaint and the answer are admitted to be true. The defendant raises the question that he is entitled to homestead exemptions, and resists the sale of the property on that ground. I hold that the charter of the plaintiff and the agreement of insurance create a lien on the property insured and the real property upon which the same is situated. The claim

of homestead cannot prevail against this lien or its enforcement. It is ordered and decreed that the property described in the complaint (if so much be necessary) be sold by the clerk of this court on salesday in July, 1896, etc.

"The matter herein presents a novel question in relation to the homestead exemption—whether or not, under the circumstances, the benefit of the exemptions should be allowed the defendant. As in the previous judgment heretofore rendered, I hold that, under such contract, no such exemption should be allowed him. Upon the appeal, for the settlement of this question, certain facts contained in the record were admitted. No question was made as to the time at which the contract was made with reference to the incorporation of the plaintiff herein, but argument was made below upon the admitted facts of the complaint, answer, etc. In the decision on appeal, the case was decided upon the time of its contraction with reference to the incorporation of the plaintiff. It is proper for me to say that no such question was made before me, and the admitted facts for the settlement of this case contained no such issue before me. Certain facts were admitted, and judgment was rendered upon such admission. Let this report be made a part of the 'case' on appeal."

Exceptions on appeal: "1. That his honor erred in holding that the alleged contract of insurance is anything more than an attempted waiver of homestead; 2. That his honor erred in holding that the charter of the plaintiff creates such a lien on all the property described in the complaint as will defeat the claim of homestead; 3. That his honor erred in holding that the policy of insurance and charter of the plaintiff create such a lien on said property, both real and personal, as will defeat the defendant's claim of homestead, when it is respectfully submitted that they create a lien, if any, on said personal property only; 4. That his honor erred in holding that the plaintiff had a lien on the land described in the complaint, when it appears that the policy or contract of insurance only purports to assign to plaintiff the dwelling-house and the personal property insured; 5. That his honor erred in holding that the claim of homestead herein can be defeated in any other way than by aliening or mortgaging said property; 6. That his honor erred in ordering the sale of the property described in the complaint."

W. A. & H. A. Brunson, for the appellant.

Thompson & Kershaw, for the appellee.

⁴⁵⁶ JONES, J. The sole question in this case is, whether the plaintiff association, by its charter and the contract of insurance with the defendant, a member, has a lien on the property insured for the member's portion of ⁴⁵⁷ the association's losses and expenses, which will prevent the defendant from claiming a homestead therein against such claim.

This action was commenced January 1, 1896, to enforce an alleged lien for three dollars and fifty cents against certain real and personal property of the defendant, to pay his pro rata portion of the losses and expenses of the plaintiff corporation. On the former appeal in this case, the judgment of the circuit court was reversed, on the ground solely that the alleged contract of insurance, according to the record before this court, antedated the act incorporating the plaintiff. This court, while reversing the judgment below on this point, surmising that there was some error in the pleadings below, gave leave to apply for amendment. In justice to Judge Buchanan, who heard the case, it should be said that the point upon which the case was reversed was not called to his attention or passed on by him. The pleadings having been amended, the case was again submitted to Judge Buchanan, who held that the charter of the plaintiff and the agreement of insurance create a lien on the property insured and the real property upon which the same is situated, and that the claim of homestead cannot prevail against this lien or its enforcement, and accordingly decreed for sale of the property, or so much as may be necessary to pay the claim, etc. The case was heard upon the facts stated in the complaint and answer, which, with the exhibit, the decree and report of his honor, and the exceptions, will be found in the report of this case. The exceptions raise practically the one question stated at the beginning of this opinion.

We hold with the circuit court on this question. The plaintiff is a mutual insurance association, chartered by the legislature of this state, December 18, 1894, with power to "mutually insure the respective dwelling-houses, barns, and other buildings of its members of Florence county against loss by fire, wind, or lightning, upon such terms and under such conditions as may be fixed by the by-laws of said corporation." Section 4 of the act of incorporation, incorrectly ⁴⁵⁸ set out in the complaint, is as follows: "That every member of said corporation shall be and is hereby bound and obliged to pay his, her, or their portion of all losses and expenses accruing to said corporation; and

all buildings and other property insured by and with said corporation, together with the right, title, and interest of the assured to the lands on which such buildings or other property may stand, shall be pledged to the said corporation; and the said corporation shall have a lien thereon against the insured, his or her heirs, representatives, and assigns, during the continuance of their insurance, as to all debts or liabilities contracted or incurred by said corporation subsequent to the passage of this act." When, therefore, a person becomes a member of this association and enters into the contract of insurance, he voluntarily gives to the corporation the lien upon the dwelling-houses, barns, and outbuildings insured, together with the right, title, and interest of the insured to the lands on which such buildings stand. (We are not to be understood as ruling that this association has power to insure, and by its charter acquire therefor a lien upon personal property. This question is not before us. Indeed, in the third exception of appellant, it is claimed that the charter and contract create a lien, if any, on the personal property only. While the first exception might be strained to cover this question, the question was not made before the circuit court nor argued in this court, hence we assume it is not intended to be made.)

The question is to be determined by the constitution of 1868, in force when the contract in question was made. Under that constitution, it has been often adjudged that the homestead is not an estate, but a mere exemption from attachment and sale under any meane or final process issued from any court. The title and dominion over the property remaining with the owner. he could alienate or encumber it as he saw fit, consistently with the constitutional or statutory enactment creating the homestead. The constitution of 1868 placed no limitation on this power. But it ⁴⁵⁹ is provided in section 2130 of the Revised Statutes that: "No waiver of the right of homestead, however solemn, made by the head of a family at any time prior to the assignment of the homestead, shall defeat the homestead provided for in this chapter; provided, however, that no right of homestead shall exist or be allowed in any property, real or personal, aliened or mortgaged, either before or after assignment, by any person or persons whomsoever, as against the title or claim of the alienee or mortgagee, or his, her, or their heirs or assigns." It has been held that this act limits the modes of defeating a homestead to those named therein, alienation or

mortgage of the property: *Hendrix v. Seaborn*, 25 S. C. 485; 60 Am. Rep. 420. The mortgage, however, need not be in form a legal mortgage—an equitable mortgage may defeat the homestead allowed by the constitution and act under consideration. Besides the “pledge” of the property insured, the “lien” thereon, which is “a tie that binds property to a debt or claim for its satisfaction,” is, in this case, given by statute, upon the assent of the owner by his becoming a member of the association and entering into the contract of insurance, designating the property insured and subject to the lien. The express purpose of the act of incorporation was to give a lien on the very property usually included and claimed under homestead exemption, “the dwelling-house, etc.” The lien created by the statute and contract pursuant thereto, is a mortgage in the sense of section 2130, quoted above. It is a voluntary pledge or dedication of specific property as a security for the satisfaction of an obligation.

We reach this result with all the more satisfaction, because the legislation and contract in question are not hostile to the preservation of homesteads, but, on the contrary, are directly designed to afford owners of homesteads, at small expense, mutual protection against the destruction of their homes.

The judgment of the circuit court is affirmed.

PLEDGE—DISTINGUISHED FROM MORTGAGE.—Although a pledge is not technically a mortgage, the subject of it not having been assigned or transferred by an instrument known to the law as such, with a condition of defeasance, yet, where it is given as a security for a debt, it partakes of the nature of a mortgage; and is subject to some of its incidents: *Bryson v. Rayner*, 25 Md. 424; 30 Am. Dec. 60. See extended note to *Lucketts v. Townsend*, 49 Am. Dec. 731, and note to *Wilson v. Little*, 51 Am. Dec. 313.

HOMESTEAD—FOR WHAT CLAIMS LIABLE.—While a homestead is exempt from execution for ordinary debts, yet it is made chargeable for debts by the acts of the parties interested in its preservation, and by operation of law: *Bishop v. Hubbard*, 23 Cal. 514; 83 Am. Dec. 132. See monographic note to *Mertz v. Berry*, 45 Am. St. Rep. 883.

NUNNAMAKER v. COLUMBIA WATER POWER COMPANY.

[47 SOUTH CAROLINA, 486.]

EMINENT DOMAIN—DAMAGES—WAIVER OF.—If land is purchased, when it might have been condemned, the consideration is conclusively presumed to cover all damages to the remainder of the tract for which the owner could have obtained compensation in condemnation proceedings.

Melton & Melton and J. S. Muller, for the appellant.

Abney & Thomas, for the appellee.

⁴⁸⁶ JONES, J. This case being in all respects, except in one particular to be hereinafter noticed, like the case of George F. Leitzsey against the Columbia Water Power Company, just decided by this court, is ruled by the principles therein announced.

The point of difference in this case and the one just referred to is this: In the third paragraph of the complaint it is alleged that "On or about the thirteenth day of March, 1891, the said board of trustees of the Columbia Canal purchased from the plaintiff herein the right to overflow and cover with water, and keep covered with water, fourteen and two-thirds acres, part and parcel of the tract of land described in the second paragraph, and bordering on the said river." These acres, however, are not included in the sixty acres for injuries to which damages are demanded.

To this defendant demurred as follows: "The complaint upon its face shows no cause of action, in that it appears therein that the plaintiff granted to the board of trustees, under whom defendant claims, the right to overflow and cover with water, and keep covered with water, fourteen and two-thirds acres of land, being part and parcel of the same tract alleged now to be damaged by reason of the keeping up and maintaining of the dam alleged in the complaint to be a nuisance. In law, this grant of the easement to overflow this portion of the particular tract of land has the same effect as if condemnation proceedings had been taken under the provisions of law, and all injuries to the residue of the tract of land are conclusively presumed to have been taken into consideration in fixing the amount of the purchase money of the parcel of land so granted." The demurrer was sustained on this ground as well as upon the other grounds stated in said Leitzsey' case, and appellant's third exception in this case alleges error. The circuit court did not err.

⁴⁸⁷ In Lewis on Eminent Domain, section 566, it is stated: "If one individual should convey to another a strip of land to be used for a railroad, there would be a release of all damages resulting from the operation of the road in a reasonable and proper manner." This is precisely what this court decided in Wallace v. Columbia etc. R. R. Co., 34 S. C. 62. In the last-mentioned case, the railroad company acquired a right of way by agreement with the landowner, and it was held that the landowner could not maintain an action against the company for damages resulting to the landowner from the construction and maintenance of its roadbed, without showing that the damage was the result of the unskillful and negligent manner in which the work was done. Randolph on Eminent Domain, 129, says: "There is a well-settled rule to the effect that where property is purchased when it might have been condemned, the consideration is conclusively presumed to cover all damages to the remainder of the tract for which the owner could have obtained compensation in condemnation proceedings." In Chicago etc. Ry. Co. v. Smith, 111 Ill. 363, it is held that where a person conveys a right of way over his land, it will be conclusively "presumed that all the damages to the balance of the land, past, present, and future, were included in the consideration paid him for his conveyance, the same as an assessment of damages on a condemnation would be presumed to embrace." To the same effect is the well-considered case of Watts v. Norfolk etc. Ry. Co., 39 W. Va. 196, 45 Am. St. Rep. 894, which holds that when one grants to a railroad company a strip of land for its use in the construction of its road, all damages to the residue of the tract arising from construction, which can be taken into consideration in the assessment of compensation under proceedings for condemnation are released. There are many other cases to this effect. It would be unreasonable to hold that a voluntary grant of a right of way is not as effectual to protect the grantee from suit for damages arising from its proper use, as a right of way taken under compulsory proceedings. This, which is settled law as to railroads, applies on principle ⁴⁸⁸ to canals as well. We have shown in Leitzsey's case that this land, including its use for the purpose for which it was granted, may have been condemned for the necessary use of the canal. The plaintiff, having seen fit to grant license to permanently flood a part of his tract of land for the maintenance of the canal, is presumed to have taken into consideration the damage to the

residue of his tract, which would accrue to him from the proper and reasonable use of the right granted. If for such use he did not get adequate compensation in the price paid for the grant or license, and greater injury than he contemplated has resulted from such reasonable use, it is *damnum absque injuria*.

The judgment of the circuit court is affirmed.

EMINENT DOMAIN.—CONSENT OF OWNER OF LAND TAKEN for public use by a statute may be subsequent, presumed, and tacit, as well as previous and positively expressed: *Wellington's case*, 16 Pick. 87; 26 Am. Dec. 631, and a landowner is estopped by accepting compensation for land taken pursuant to a statute from afterward denying that he consented to the taking: *Embury v. Connor*, 3 N. Y. 511; 53 Am. Dec. 325, and extended note. See, also, *Louisville etc. Ry. Co. v. Blythe*, 69 Miss. 939; 30 Am. St. Rep. 599.

HUNTER v. RUFF.

[47 SOUTH CAROLINA, 525.]

JUDGMENTS—CONCLUSIVENESS OF.—An order made by a circuit judge deciding that a person is not a party to a proceeding before him, if not appealed from, is absolutely binding upon any succeeding circuit judge, whether right or wrong, and it is beyond the power of the latter to review or reverse such order.

PROCESS—CONSTRUCTIVE SERVICE.—If a nonresident party is served with summons by publication, plaintiff need not show that such party actually received the summons mailed to him in order to obtain judgment on such service.

JUDGMENTS—CONCLUSIVENESS OF WHEN BASED ON SERVICE BY PUBLICATION.—In an action against a nonresident defendant founded on service by publication, the fact that a copy of the summons was not mailed to him at his correct place of residence, but was mailed to him at the place which the plaintiff makes oath that after inquiry he was informed was defendant's place of residence, such fact does not render the judgment void, but only voidable upon proof made in a subsequent proceeding instituted for that purpose, and such subsequent showing is not allowed to affect the validity of any proceedings taken under such judgment prior to such showing.

JUDGMENTS AGAINST NONRESIDENTS—CONCLUSIVENESS OF.—A defendant who seeks to assail a judgment recovered against him while he was a nonresident cannot divest rights of innocent purchasers which have vested before any assault has been made upon the judgment, which upon its face was entirely regular and free from infirmity at the time that the purchase was made.

Following is the order of Kershaw, circuit judge, for judgment under which the defendant purchased and which is referred to in the opinion in the principal case: "The summons and complaint in this action having been filed in the office of the clerk of this court on the twenty-seventh day of December, 1887, and

the defendant, Cyrus William Hunter, being not a resident of this state, and having property within this state, service of the summons upon said defendant by publication having been ordered, and, pursuant to said order, the summons having been duly published in the Winnsboro News and Herald once in each week for six successive weeks, commencing on the twenty-ninth day of December, 1887; and a copy of the summons having been duly mailed to said defendant, Cyrus William Hunter, addressed to him at Leon, state of Nicaragua, Central America, his place of residence; and the time to answer having expired, and no answer or demurrer having been served on the plaintiff's attorneys; and the defendant having failed to appear, and an attachment having been issued against and upon property belonging to the defendant, Cyrus William Hunter, and proof thereof made by the affidavit of Henry N. Obear; and the defendant being not a resident of this state, the plaintiff having now in court made proof of the demand mentioned in the complaint, and the plaintiff having now in court been examined on oath respecting any payments that have been made to the plaintiff, or to any one to his use on account of such demand, whereby it appears that no such payments have been made; and the plaintiff having produced an undertaking with two sureties, approved by the clerk of this court, that he will make restitution if required, according to the requirement of subdivision 2 of section 267 of the Code of Procedure; now, on filing said affidavit of Henry N. Obear and said undertaking, and on motion of Messrs. Obear & Rion, plaintiff's attorneys, it is ordered, that the plaintiff, Richard S. Desportes, recover against the defendant, Cyrus William Hunter, the sum of one hundred and eighty-two dollars and eighty-five cents, together with his costs, to be adjusted by the clerk of this court."

The following is the opinion or decree of Aldrich, circuit judge, also referred to in the opinion in the principal case:

"This is an action for the recovery of the possession of real property, lying in the county of Fairfield, and damages for withholding the same. Trial by jury being waived, the action was heard by the court. The evidence submitted consists of records of this court, and an agreed statement of facts; while the parties practically agree upon the facts, they differ widely in their views of the law, and these legal issues are submitted for the judgment of the court. On June 20, 1888, a judgment by default was entered up in the court in favor of one Richard S. Desportes, and

against C. W. Hunter, plaintiff herein, in the sum of two hundred and thirty-two dollars and thirty-five cents. The subject of said action was a money demand, viz., a sealed note, purporting to have been given by said Hunter to said Desportes, at Ridgeway, South Carolina, on January 5, 1871. Said Hunter was for many years prior to the institution of said action a nonresident of this state, residing in the state of Nicaragua, in Central America, and still remains a resident of that state. At the beginning of said action said Hunter owned a tract of land in Fairfield county, and still owns the tract involved in this action, unless he has lost his title thereto by reason of the facts hereinafter stated. On December 27, 1887, said Desportes began the aforesaid action upon said money demand against the plaintiff herein by an attempt to serve the summons by publication, and by procuring an attachment to be issued and levied upon the land in dispute. Soon after the aforesaid judgment was entered up, execution was issued thereunder, levied upon the land in question, and it was sold by the sheriff of Fairfield county under said execution to the defendant herein, to whom he made a deed under which defendant entered into possession of premises, and still retains possession. Defendant paid bid, and the sheriff applied same to the payment in full of said judgment debt, satisfying the same on November 15, 1888, and the surplus, one hundred and twenty-three dollars, is still in the hands of the sheriff. Matters remained in this status until September 16, 1889, when plaintiff, upon due and proper notice served upon said Desportes and A. F. Ruff, defendant herein, moved this court to set aside the said judgment by default in favor of Desportes and against plaintiff, and the sale to defendant made thereunder. A. F. Ruff was made a party to this motion, his attorney accepted service for him, and he submitted an affidavit, and was heard by counsel in opposition thereto. I note this fact, because the learned judge who heard the motion seemed to think that A. F. Ruff was not a party defendant therein. This motion was heard by this court, and his honor Judge Fraser, the presiding judge, on December 3, 1891, determined said motion by an order or decree, wherein he says, this is 'a motion to set aside: 1. An order for judgment, made June 20, 1888, for one hundred and eighty-two dollars and eighty-five cents and costs; and 2. A sale of a tract of land made in pursuance of an execution issued thereunder to A. F. Ruff by the sheriff of Fairfield county. Except that A. F. Ruff has furnished an affidavit to be used at the hear-

ing of this motion, he has not otherwise been made a party to the proceeding before me, I do not, therefore, see how I can with propriety make any order setting aside the sale which will be binding upon him.' Judge Fraser then takes up the question of service by publication, and after noting wherein the service was illegal, and that the court never acquired jurisdiction of the person of Hunter, says: 'This order does not set aside the attachment, or the service of the attachment, or the sale, nor dismiss the complaint, *as these matters are not properly before me* (italics mine). It is ordered and adjudged that the judgment and execution above referred to be set aside for want of jurisdiction, and that the plaintiff have leave to proceed as he may be advised.' This order was duly filed in the office of the clerk of the court for Fairfield county, and formal notice of the filing of the same, given by the attorneys for Hunter, was accepted on February 26, 1892, by Mr. Obear, as attorney for Desportes, and McDonald & Douglass, attorneys for A. F. Ruff, defendant herein.

"The defendant, A. F. Ruff, was formally made a party to said motion to set aside the judgment. He appeared by counsel at the hearing, submitted affidavits in opposition to the motion, and was duly served with notice of Judge Fraser's decree. Neither R. S. Desportes nor A. F. Ruff appealed from said decree, and the judgment of Judge Fraser is the law of this case upon all the issues adjudicated by him. This fact should be noted and observed. His decree, unappealed from under the law of this state, as well as official amenity, is binding upon me and every other court in this state. It is elementary law, requiring recitation of no authority in support thereof, that when parties have had their day in court, submitted their controversy to it, and the court has rendered its judgment thereon, that controversy is ended—it is *res adjudicata*, and the parties are estopped from again litigating the issue thus decided.

"This is a most salutary rule of law, as the wisdom of the past and the experience of the present demonstrates. This plaintiff and the defendant herein were parties to the motion above related, and are bound by the decree of Judge Fraser. That decree, in express terms, decides: 1. That the 'judgment' be 'set aside'; 2. That the 'execution' be 'set aside'; and 3. That said judgment and execution were 'set aside' for want of jurisdiction in the court over the person of Hunter. So far as the record before me discloses, Desportes never availed himself of the 'leave'

given by Judge Fraser, 'to proceed as he may be advised.' He did nothing. Matters remained in this condition until May 22, 1893, when the present action was begun. Afterward, the complaint was amended, and, as amended, served upon defendant January 24, 1894. The amended complaint is in the usual form for the recovery of real property, and for damages for the withholding of the same.

"Defendant in his answer, for a first defense, denies each and every allegation in the complaint. I need not discuss in detail, and as a separate matter, this defense, because many of the allegations in the complaint are true, supported by the record and the agreed statement of facts. The real issue comes up in the other defenses, and upon these issues I will discuss every matter included in the general denial. For a second defense, the defendant states the facts upon which his title and right to the possession of the land depends, to wit, the judgment, sale, sheriff's deed, etc., as above stated, and alleges 'that at the time of his said purchase this defendant did not have any notice actual, constructive, or otherwise, of any defect or irregularities in the said judgment and execution; but the same appeared to be regular upon their faces, and this defendant, therefore, avers that he is an innocent and bona fide purchaser for a valuable consideration, without notice, and entitled in law and equity to the protection of this court.' Under the facts of this case, it is hard to comprehend the scope of the position thus taken by defendant. He cannot rely upon the judgment and execution in the case of *Desportes v. Hunter*, because they no longer exist; they have been "set aside," are legally dead, and cannot support defendant's title from the sheriff. It is admitted that plaintiff was, prior to said sheriff's sale, the owner in fee of the land, and, prior to the levy of the attachment and sale, entitled to the possession thereof. "The plaintiff must, in order to entitle him to recover, show: 1. A legal estate in the premises existing in him at the time the suit was commenced; 2. A right of entry in himself; 3. That at the commencement of the suit the defendant, or those claiming under him, was in possession of the premises": 6 Am. & Eng. Ency. of Law, 245, 12.

"Defendant admits that he is in possession; therefore, nothing further need be said upon that subject. When defendant admits that plaintiff was at one time the owner in fee of the premises, and entitled to the possession thereof, and then sets up a title derived through judicial proceedings from plaintiff, he admits

that plaintiff is the common source of title. That being so, the question is, which has the better title? 'Both the judgment and execution are links in the title to property purchased at sheriff's sale, both are necessary, and if either is void, the title of the purchaser fails': *Tobin v. Myers*, 18 S. C. 327; *Jones v. Crawford*, 1 McMull. 373; *Evans v. Hines*, 1 McMull. 490; *Ingraham v. Belk*, 2 Strob. 207, 218; 47 Am. Dec. 591. The question, then, is, Was said judgment and execution, either or both, void? If so, defendant's title is void.

"Plaintiff, in moving to set aside the judgment and execution, upon notice in the original action of *Desportes v. Hunter*, complied with the law and practice of this state: *Crocker v. Allen*, 34 S. C. 456; 27 Am. St. Rep. 831; *Turner v. Malone*, 24 S. C. 398; *Prince v. Dickson*, 39 S. C. 480. Plaintiff acted wisely in making A. F. Ruff, the purchaser under the execution and the party in possession of the land, a defendant in said motion, because Ruff was a party seriously and deeply interested in the subject matter of said motion. The setting aside of said judgment and execution, if held to be void, ipso facto destroys his title.

"When Judge Fraser adjudged the said judgment and execution 'be set aside,' for want of 'jurisdiction' in the court over the person of Hunter, was that in law a judgment that they were void? 'Jurisdiction naturally divides itself into three heads. In order to the validity of a judgment the court must have jurisdiction of the persons, of the subject matter, and of the particular matter which it assumes to decide. It cannot act upon persons who are not legally before it, upon one who is not a party to the suit, upon a plaintiff who has not invoked its arbitrament, or upon a defendant who has not been notified of the proceedings': 1 Black on Judgments, sec. 215. The same author says: 'It is a familiar and universal rule that a judgment rendered by a court having no jurisdiction, of either the parties or the subject matter, is void and a mere nullity, and will be so held and treated whenever and for what purpose it is sought to be used or relied on as a valid judgment. . . . They are not voidable, but simply void, and form no bar to a recovery sought, even prior to a reversal, in opposition to them. . . . Hence, for example, if a judgment is merely erroneous, the title acquired by a sale under it is valid and cannot be impeached collaterally; but if it is void for want of jurisdiction, the vendee takes no title whatever, and the sheriff's deed does not even create a cloud on

the title which a court of equity can remove': 1 Black on Judgments, sec. 218, p. 265. 'It is an unquestioned principle of natural justice that a man should have notice of any legal proceedings that may be taken against him, and a full and fair opportunity to make his defense. The law never acts by stealth, it condemns no one unheard': 1 Black on Judgments, sec. 220, p. 267. In *James v. Smith*, 2 S. C. 183, where the subject is discussed, and the authorities cited, it was held that, where a court is without jurisdiction, the judgment is void, and must be so regarded when it comes before another court: See, also, *Cooley's Constitutional Limitations*, 466, 467; *State v. Newlane*, 7 S. C. 245; *Miller v. Miller*, 1 Bail. 245, 246. In *Trapier v. Waldo*, 16 S. C. 290, the supreme court say: 'It seems to us that the court in Charleston never acquired jurisdiction over *the persons* [the words "the persons" italicised by the supreme court] of Gertrude Waldo and her infant son, Rhinelander. This was not a mere irregularity, but a substantial defect, which rendered the decree of foreclosure and order of sale void, so far as these parties are concerned, and we are, therefore, constrained to hold that to this extent the title tendered the purchaser was defective and cannot be cured.' Caveat emptor is the rule governing sheriff's sales. 'Every man who goes to a sheriff's sale ought to take care': *Thayer v. Sheriff*, 2 Bay, 171; *Yates v. Bond*, 2 McCord, 382; *Charleston v. Blohme*, 15 S. C. 124, 40 Am. Rep. 690. It may be argued that this rule is intended to warn the purchaser that he takes title to property purchased at his own risk. This is not the proper construction. 'A purchaser of property' at execution sale 'must examine and judge for himself as to the title and quality': *Anderson's Law Dictionary*, 159. 'It is well settled that a purchaser at a judicial sale (where the rule caveat emptor does not apply) is bound to make inquiry as to the jurisdiction of the court which ordered the sale, and whether all proper parties were before it': *Trapier v. Waldo*, 16 S. C. 282; *Gardner v. Cheatham*, 37 S. C. 77; *Smith v. Winn*, 38 S. C. 192; *Cathcart v. Sugenhimer*, 18 S. C. 123; *Tidral v. Bouknight*, 25 S. C. 275; *Iseman v. McMullan*, 36 S. C. 36.

"Many writers and courts have discussed the question, what judgments are void and voidable? Mr. Black, in his work on Judgments, volume 1, section 218, pages 265, 266, says: "The result deducible from a majority of the cases seems to be, that it is only when the judgment appears upon its face to have been rendered without jurisdiction that it can be considered a nullity

for all purposes'; and in sections 170, 246, 270, 290, the learned author endeavors to state the distinctions between void and voidable judgments. Mr. Freeman, in his work on Judgments, says: 'The weight of the adjudged cases . . . sustains the proposition that the judgment of a domestic court of general jurisdiction is not void, except when the court has no jurisdiction over the subject matter of the suit, or when, having such jurisdiction over the subject matter, it is shown by the record to have no jurisdiction over the judgment defendant': Freeman on Judgments, sec. 116. Again, he says, in section 116: 'A judgment rendered without in fact bringing the defendant into court, unless the want of authority over them appears in the record, is no more void than if it were founded upon a mere misconception of some matter of law or of fact occurring in the exercise of an unquestionable jurisdiction': See, also, Freeman on Judgments, secs. 124-135. It is settled law in this state that where, upon the face of the record, it is apparent that the court never acquired jurisdiction of the person of the defendant, that a judgment against such defendant is void: Gardner v. Cheatham, 37 S. C. 74. The rule and principle deduced from the authorities in this state establish the proposition that a judgment, regular on its face, is not a void judgment, in the sense that it can be treated as such in a collateral proceeding; but that they are voidable, in a direct proceeding in the original case, when extrinsic evidence shows a want of jurisdiction over the person of the defendant: Stanly v. Stanly, 35 S. C. 97, 98; Turner v. Malone, 24 S. C. 401-405; Gardner v. Cheatham, 37 S. C. 74, and other authorities cited. In Le Conte v. Irwin, 19 S. C. 554, a decree for foreclosure of mortgage, after a sale of the premises thereunder, was set aside, but the title of the purchaser was held to be good. The judgment in this case was set aside, under section 195 of the code, upon the ground of 'excusable neglect, and the irregular, if not illegal, mode of entering and enforcing the judgment for money and foreclosure and sale' This was a motion addressed to the discretion of the court, and the case, therefore, is without authority as to the subject of jurisdiction. In Eason v. Witkowsky, 29 S. C. 239, 'the proceedings in escheat' were under a special statute, and the notice to claimants was adjudged sufficient.

"Counsel for defendant, in his argument, says, it is well settled that the purchaser under an execution not void, but voidable only, will be protected in his title, and, in support of this proposition,

cites *Henry v. Furgerson*, 1 Bail. 512; *Ingraham v. Belk*, 2 Strob. 207; 47 Am. Dec. 591; *Williamson v. Farrow*, 1 Bail. 611; 21 Am. Dec. 492; *Lawrence v. Grambling*, 13 S. C. 124; *Darby v. Shannon*, 19 S. C. 526; *Tobin v. Myers*, 18 S. C. 328; *Freeman on Executions*, sec. 343. In *Tobin v. Myers*, 18 S. C. 327, it is held: 'For reasons of policy to sustain sheriff's sales, purchasers at such sales are favored to the extent that mere irregularities in the process will not avoid the sale. If purchasers, at their peril, were held responsible for the perfect regularity of process under which property is sold, the result would be that property would be sold at a sacrifice, and the usefulness of such sales be greatly impaired, if not destroyed; but this rule as to mere irregularities does not apply where *either the judgment or the execution is absolutely void*' (italics mine). Mr. Freeman, in his work on *Executions*, volume 2, section 345, in discussing the effect of reversal of a judgment, where a stranger has purchased under it, says: "The distinction between a void and an erroneous judgment must be kept in view, for if a judgment is void, no rights can be based upon it. The reversal of a judgment on appeal, on the ground, not of errors in proceeding, but because the lower court had no authority to proceed, would be, in legal effect, a declaration that the judgment was void. The judgment may not be wholly void, and yet be substantially so, because the parties whose interest was sought to be affected were not before the court. Their title cannot be imperiled, whether there is an appeal or not. If an appeal is taken and a reversal ordered on this ground, the defect of parties is judicially declared. Titles resting on such judgment will, therefore, be declared invalid. But this invalidity arises, not from the reversal, but from the original judgment, which is found to be so destitute of legal authority that it might have been disregarded by the parties.'

"Judge Fraser found, by his decree, that the judgment of *Desportes v. Hunter* was not, in law, a judgment, not because of irregularities therein, but because the court had no jurisdiction of the person of Hunter. Hunter had no notice of the action, could not, therefore, defend himself, or appeal therefrom; but as soon as he heard of it, he, according to the law of this state, procured a judgment of this court setting aside the judgment and execution 'for want of jurisdiction'; was not that, 'in legal effect,' an adjudication 'that the judgment was void?' The case of *Williamson v. Farrow*, 1 Bail. 619, 21 Am. Dec. 492, cited by the defendant, states the dis-

tion. O'Neill, J., delivering the opinion of the court, says: "The general rule as to purchasers at sheriff's sales is, that when the defect in the proceedings is such a one as may be cured by consent, acquiescence, or amendment, it does not affect title. But when it is a defect of substance, as a want of authority from the court, or when the authority is absolutely void, it vitiates and destroys the sale, and title under it." This case is cited with approval in *Laurence v. Grambling*, 13 S. C. 124, where the authorities are collected.

"If it is true, as a legal proposition, that a judgment against a person never brought within the jurisdiction of the court, by legal process, is void, and a proper court has, by its decree, pronounced such judgment void, it would seem to be a solecism to say that such judgment is voidable. In this case, Hunter, a resident of a foreign country, hears that A. F. Ruff, a stranger, is in possession of his land, claiming titles thereto as a purchaser under a judgment and execution against him. He seeks legal advice, is told that the alleged judgment is void, advised to go into the court which rendered said judgment, and ask that it be set aside. The court grants the relief sought, and sets aside its own judgment, and the execution issued thereon, not for irregularities, but upon the substantial ground, 'want of jurisdiction' over the person of the defendant in said alleged action. With this deliverance from the court, contained in a formal decree, made in a proceeding to which A. F. Ruff is a party, and from which no appeal was taken, it would be a mockery of justice to allow Ruff to retain the title and possession of Hunter's land. The sale and the sheriff's deed, as a legal consequence, fell with the judgment. From the authorities cited, it would seem that when a judgment and execution, after sale thereunder, are set aside, for irregularities, the title of a bona fide purchaser, as a general rule, is not impaired; but when a judgment and execution, after sale thereunder, is set aside by a court of competent jurisdiction, 'for want of jurisdiction' in the court which rendered the judgment, the title of the purchaser is void. The decree setting aside the judgment and execution, 'for want of jurisdiction' in the court which rendered it, is an adjudication that such judgment and execution were void ab initio. As a third defense, defendant alleges the proceedings in attachment, the issuance, levy, etc., thereof upon the land in dispute, and further alleges: 'That said action is still pending in this court, and said attachment has never been vacated or set aside by any

order of this court, or otherwise; and should this court hold the aforesaid judgment defective, then the defendant asks that he may be subrogated to the rights of the said Richard S. Desportes in said action.' The land in dispute was not sold under the proceedings in attachment, it was sold under the judgment and execution. The law of attachment depends upon the statutes of this state. Property is attached 'as a security for the satisfaction of such judgment as the plaintiff may recover': Code, sec. 248. This section is a part of title 7 of the code, 'Of the Provisional Remedies in Civil Action.' 'Now, as an action cannot, as formerly, be commenced by attachment, which is now only a provisional remedy in aid of an action, it follows, necessarily, that if an action fails for want of jurisdiction, the provisional remedy by attachment, in aid of such action, must fall with it': *Central R. R. Co. v. Georgia Co.*, 32 S. C. 312. 'Property levied on after the action is commenced, under a warrant of attachment, and not described, even mentioned in the complaint, is not the subject of the action. In an action on money demands, property of the defendant, attached to secure the judgment when rendered, is not the subject of the action': *Central R. R. Co. v. Georgia Co.*, 32 S. C. 320.

"Code, section 160, provides: 'From the time of the service of the summons in a civil action, or the allowance of a provisional remedy, the court is deemed to have acquired jurisdiction, and to have control of all subsequent proceedings.' Again, 'for the purpose of this section (providing for attachments), an action shall be deemed commenced when the summons is issued; provided, however, that personal service of such summons shall be made, or publication thereof commenced within thirty days': Code, sec. 248. When an action fails for want of jurisdiction, attachment therein falls with it: *Central R. R. Co. v. Georgia Co.*, 32 S. C. 319. The action in *Desportes v. Hunter* failed 'for want of jurisdiction'—judgment of Judge Fraser. Therefore, the attachment fell with the judgment and execution, and is legally dead. In the case of *Darby v. Shannon*, 19 S. C. 526, it was said in the discussion of the case, that even when no summons has been served, but attachment has been issued, the court has jurisdiction for certain purposes. The court used this language in reference to the rights of third persons.

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Fraser's decree, holding that the alleged service was illegal, that it did not give the court jurisdiction of the defendant, is dated December 3, 1891, was filed on December 5, 1891, and notice thereof was served upon Ruff and Desportes. An illegal service is, in law, no service, and, under the proviso to section 248 of the code above cited, the attachment lost its force and effect.

"It may be argued that, as Judge Fraser in his order says, 'this order does not set aside the attachment, or the service of the attachment,' that the attachment still remains; but this would be doing the judge an injustice. He makes this statement, because, as he himself says, 'these matters were not properly before him.' If Judge Fraser had held that the attachment and service thereof were legal and valid, such a decree, unappealed from, would be the law of this case. He did not pass upon these issues, disavowed any intention of doing so, and the attachment must stand or fall upon its merits.

"The counsel for defendant cites from the third paragraph of section 156 of the code, 'but the title to property sold under such judgment to a purchaser in good faith shall not be thereby affected.' The paragraph from which these words are quoted provides, 'the defendant against whom publication is ordered . . . may . . . be allowed to defend after judgment, or at any time within one year after notice thereof, and within seven years after its rendition on such terms as may be just . . . but the title to property sold under such judgment to a purchaser in good faith shall not be thereby affected.' This provision is intended for the relief of a person who has been duly and legally served by publication, over whose person the court acquired jurisdiction, and against whom judgment has been rendered. If upon 'sufficient cause shown,' for example, the plaintiff has taken advantage of the defendant, or the judgment as against the plaintiff is voidable for irregularities, the court 'may' allow the defendant proper relief, 'but' the title to property sold shall not thereby be affected. This is in accord with the law of this state, as it exists to-day and as it stood prior to the code practice.

"Defendant asks to be 'subrogated to the rights of said Richard S. Desportes in said action.' What rights? Said action in law no longer exists. The only rights possessed by Desportes is the right to sue on his alleged sealed note, and to attach plaintiff's property. Plaintiff, in his affidavit, deposes that he has a defense to said note; R. S. Desportes is not a party to this action,

and I can make no order affecting his rights. 'Subrogation is an equitable and not a legal right. . . . It will not be enforced when it works an injustice to the rights of those having equal equities': 24 Am. & Eng. Ency. of Law, 191. Ruff is a mere volunteer. He was not obliged to purchase this land to protect himself against an obligation for which he was bound. He relied upon the title he was purchasing, and it was his misfortune, not Hunter's fault, if he got nothing. Caveat emptor and subrogation are, in many respects, inconsistent doctrines—the former a rule of law, the other a doctrine of equity, and equity follows the law. Subrogation protects and enforces an existing right, but equity cannot make a void judgment valid. If Ruff is entitled to subrogation, it is to a void judgment. It seems to me that Ruff's remedy, if he has any, and upon this subject I express no opinion, is against Desportes and the sheriff for money had and received. The doctrine of bona fide purchase for valuable consideration, without notice, does not apply to this case. This plea is purely equitable, and cannot stand against the legal title: *Hill v. Burgess*, 37 S. C. 604; *Lynch v. Hancock*, 14 S. C. 90. I don't think that there is a defect of parties herein. Neither R. S. Desportes nor the sheriff claim any interest in the subject matter of this action.

"Wherefore it is ordered, adjudged, and decreed that the plaintiff herein have judgment in his favor, and against the defendant, for the recovery of the possession of the real property described in the complaint herein, to wit: All that piece, parcel, or tract of land, lying, being and situate in the county of Fairfield in the state of South Carolina, containing one hundred and eighty acres, more or less, situated near the town of Ridgeway, and bounded by land conveyed by plaintiff to Henry A. Gaillard and O. W. Buchanan on February 21, 1892, being the northern half of the tract formerly owned by Mrs. Anna F. Hunter, deceased, and designated by the letter 'W' on a plat of survey made by H. Edmunds, surveyor, and dated June 8, 1887, which said tract was bounded on the north by land of Lloyd A. Davis and Wyatt Davis, on the east by land of Walker Davis and Wyatt Davis, on the west by land of Henry Hunter, and on the south by lands of George Hunter and Davis.

"And, by consent, it is further ordered, that this action be, and hereby is, referred to G. W. Ragsdale, Esq., as special referee to take testimony, and to hear and decide all issues of fact and law in and to plaintiff's demand against defendant for

damages for the withholding of above described premises, as set out in the pleadings herein."

From this decree the defendant appealed, on the following exceptions:

"1. For that his honor erred in overruling the order or decree of Judge Fraser by holding, in this case, that the defendant, A. F. Ruff, was formally made a party to the motion to set aside the attachment, judgment, execution, and sale, when, with all the facts before him, Judge Fraser had held otherwise, and there was no appeal from his order and decision in the premises.

"2. For that his honor erred in holding that the defendant, A. F. Ruff, was bound by the order or decree of Judge Fraser, when Judge Fraser had held that he was not a party to the proceeding, and had refused to make any order concerning his rights, and had refused to set aside the sale to him.

"3. For that his honor erred in holding that the judgment, execution, and sale under which the defendant, A. F. Ruff, acquired possession of the land in dispute were void; when he should have held that said judgment and execution were voidable only, and that the sale thereunder was valid, and binding on the plaintiff.

"4. For that his honor erred in holding that the attachment fell or lost its force and effect when Judge Fraser held that the judgment and execution were void for want of service of the summons, and thus overruling the decree of Judge Fraser, who refused to set aside either the sale or the attachment.

"5. For that his honor erred in holding that the provisions of section 156 of the Code of Procedure was 'intended for the relief of a person who has been duly and legally served by publication, over whose person the court acquired jurisdiction,' etc.

"6. For that his honor erred in holding that the defendant, A. F. Ruff, was not entitled to be subrogated to all of the rights of R. S. Desportes under the judgment of Desportes v. Hunter.

"7. For that his honor erred in not holding that when there had been a regular and valid attachment of the land, at the commencement of the action of Desportes v. Hunter, the judgment, execution thereon, and sale thereunder, were sufficient to pass a good and valid title to the land so attached and sold.

"8. For that his honor erred in not holding that the attachment being still of force under the express ruling and decision of Judge Fraser, the sheriff was a necessary party, and that the plaintiff herein was not entitled to recover, when it appeared

that the right of possession was either in favor of the defendant or the sheriff under the attachment.

"9. For that his honor erred in not holding that the defendant was entitled to retain possession of the land as against the plaintiff, when it appeared that he purchased the same at a sale thereof, under an execution regular in form and issued upon a judgment apparently regular and valid upon its face, and no proceedings had been instituted before such sale to vacate and set aside the same.

"10. For that his honor erred in not holding that the said sale was valid and binding until set aside by a court of competent jurisdiction, and that the plaintiff could not recover possession until said sale was set aside; and that plaintiff, in this respect, was bound by the order and decree of Judge Fraser, in which he expressly refused to set the same aside, and there was no appeal from such order and decree.

"11. For that his honor erred in not holding that the defendant was entitled to the possession of the land in dispute, when it appeared from the undisputed facts that he purchased the same at an execution sale, under a judgment against a nonresident of this state whose land had been regularly attached at the time of the commencement of the action, which gave the court jurisdiction to render a judgment under which a valid sale of the land could be made.

"12. For that his honor erred in not holding that the said judgment, being at the most voidable only, and the defendant not having notice of any hidden vice therein, and having purchased at a fair price and paid the same, he was entitled to be protected in his purchase thereof."

J. E. McDonald, for the appellant.

J. W. Hanahan and J. G. McCants, for the appellee.

⁵⁴³ McIVER, C. J. These two cases, growing out of practically the same state of facts, and depending upon the same principles of law, were heard and will be considered together, and, for convenience, will be spoken of as one case. The facts are undisputed, and may be stated as follows: On the twenty-second day of December, 1887, R. S. Desportes commenced an action against the above-named Cyrus ⁵⁴⁴ W. Hunter, to recover the amount due upon a note under seal, bearing date January 4, 1871, and payable one day after the said date, by issuing a

summons in the usual form. On the same day, to wit, the 22d of December, 1887, the said R. S. Desportes made an affidavit that a cause of action existed in his favor against said Hunter; that the said Hunter was not a resident of this state, but resided in the city of Leon, in the state of Nicaragua, in Central America, and the said Hunter could not, after due diligence, be found in this state; and that said Hunter had property in this state, to wit, the land in controversy in these actions. Upon this affidavit a warrant was duly issued, on the 27th of December, 1887, and the same was duly levied on the said land, by the sheriff, on the 28th of December, 1887. On the 27th of December, 1887, an order for service by publication was duly made, and the copy summons was duly published in the *Winnaboro News and Herald* (a paper published in the county of Fairfield where the land in question was situated) once a week for six weeks, beginning on the 29th of December, 1887, as appeared by the affidavit of the printer of said newspaper, bearing date the 13th of March, 1888, and on the 28th of December, 1887, an affidavit of the mailing of the summons to the said Hunter, at Leon, state of Nicaragua, Central America, was duly made. The complaint was in the usual form, and, upon an affidavit of one of the attorneys in the action of all these previous proceedings, his honor, Judge Kershaw, on the 14th of June, 1888, granted an order for judgment in favor of said Desportes against the said Hunter, for the amount due upon said note, together with his costs, to be adjusted by the clerk; and on the 20th of June, 1888, judgment was duly entered in accordance with said order, a copy of which order is set out in the "case," and should be incorporated in the report of this case. Upon the judgment thus entered, an execution was duly issued, under which the land in question, which had been previously attached, was, after due advertisement, offered for sale by the sheriff of Fairfield ⁵⁴⁵ county, on the 5th of December, 1888, and was bid off by the defendant, Ruff, who, having immediately complied with his bid, received title, from the sheriff, went into possession of the land, and has since remained in possession thereof. At the time said defendant bid off the land, and paid the purchase money and went into possession, he had no notice, either actual or constructive, of any defects or irregularities (if any there be) in the said judgment and execution under which he bought. On the 16th of September, 1889, a notice, entitled, *In re Desportes v. Hunter*, was addressed to and served upon the said R. S. Des-

portes and A. F. Ruff, that the said Cyrus W. Hunter would, upon the affidavits annexed thereto, move "to set aside the order of judgment rendered against the defendant [Hunter] by alleged default in the above named case, on the day of , 188 , and the sale of the land under said alleged judgment, on the day of , 188 , and which was bought in by A. F. Ruff," upon the several grounds mentioned in the notice, only one of which is it necessary to mention, to wit, that the said Hunter was, on the 26th of March, 1888, "and for years before, a resident of the city of Jenotepe, in the Republic of Nicaragua, where he resided with his family, and was not a resident of Leon, as alleged in the pleadings," and that "no notice, summons, or information of said alleged suit was given to defendant."

This motion was heard by his honor, Judge Fraser, upon the affidavits set out in the "case," who granted an order, on the 3d of December, 1891, "that the judgment and execution above referred to be set aside for want of jurisdiction, and that the plaintiff have leave to proceed, as he may be advised." From this order there was no appeal.

These two actions, mentioned in the title of this opinion, were commenced on the 22d of May, 1893, to recover the possession of the land bid off by the defendant, Ruff, at the sheriff's sale hereinbefore referred to, for which he received sheriff's titles, under which he went into possession. The plaintiffs in the second action above stated seem to have ⁵⁴⁶ bought from Hunter a portion of the land, and their action is to recover the portion so bought by them, while the action of Hunter is to recover the balance of the land not sold to Buchanan and Gaillard, the plaintiffs in the other action. When Buchanan and Gaillard bought that portion of the land for which they sue does not appear in the "case," though it is stated in the argument of appellant's counsel that the conveyance from Hunter to Buchanan and Gaillard was made "after the sale to Ruff," while in the argument of respondent's counsel it is stated that such conveyance was made "after the judgment and execution in Desportes v. Hunter was set aside." But, under the view which we shall take, we do not think it material when such conveyance was made, inasmuch as there is no pretense that such conveyance was made before the alleged judgment obtained by Desportes v. Hunter was entered, or before the sheriff's sale under which Ruff claims.

A trial by jury having been waived, the cases were heard by his honor, Judge Aldrich, who rendered the decree set out in the "case," which should be incorporated in the report of this case, wherein he adjudges that the plaintiffs in each of said actions are entitled to recover the land in controversy, together with the damages, to be ascertained by a referee appointed for that purpose.

From these judgments the defendant, A. F. Ruff, appeals upon the several grounds set out in the record, which should likewise be incorporated in the report of this case.

We do not propose to consider these grounds *seriatim*, but only such questions presented by such grounds as we consider material to the case. It is very obvious that the controlling inquiry in this case is, whether the appellant, Ruff, acquired a valid title to the land by his purchase at the sheriff's sale, and this depends upon the question whether the judgment obtained by Desportes against Hunter, together with the execution issued to enforce the same, afforded legal authority to make the sale. This question, also, depends upon two inquiries: 1. Whether it has heretofore ⁵⁴⁷ been concluded by the order of Judge Fraser above referred to? and, if not, 2. Whether, as an original question, such judgment is valid or void? As to the first of these inquiries, we think it is clear, from the express terms of Judge Fraser's order, that it cannot be regarded as concluding the appellant, Ruff. No authority is needed for the proposition that a person cannot be bound or affected by any order, decree, or judgment in a case to which he has not been made a party in some one of the modes recognized by law. Now, the motion before Judge Fraser was not only a motion to set aside the judgment, but also a motion to set aside the sale made by the sheriff to the appellant, Ruff; and, as we construe the order of Judge Fraser, he, while granting the motion to set aside the judgment declined to grant the motion to set aside the sale, upon the express ground that Ruff, not being a party to the proceeding, would not be bound thereby. He uses this language: "Except that A. F. Ruff has furnished an affidavit, to be used at the hearing of this motion, he has not otherwise been made a party to the proceedings before me." And he adds, "I do not, therefore, see how I can, with propriety, make any order setting aside the sale which will be binding on him." So that it is manifest that Judge Fraser not only found as a fact that Ruff was not a party, but also distinctly adjudged that he could

make no order binding upon Ruff, because he was not a party, and hence he, in terms, declined to make any such order. Even if it be conceded that Judge Fraser erred in his finding of fact, and in his adjudication in accordance with such finding, that cannot affect the present inquiry. That order, not having been appealed from, must be regarded as the law of the case, and was absolutely binding, whether right or wrong, upon any succeeding circuit judge: *Warren v. Simon*, 16 S. C. 362. The question whether Ruff was a party to the proceeding before Judge Fraser was finally closed by the finding and adjudication that he was not a party thereto, and could not, therefore, be bound ⁵⁴⁸ by any order made in that proceeding; and it was beyond the power of any subsequent circuit judge to review or reverse that decision. We are, therefore, of opinion that Judge Aldrich erred in practically reversing the judgment of Judge Fraser as to the question whether Ruff was a party to the proceeding under which the judgment in question was set aside, and that appellant's first and second exceptions must be sustained. It would, indeed, be a strange result to hold that a person was a party to a proceeding under which an order granted in such proceeding should be binding upon him, in face of the patent fact that the judge who granted such order not only held that he was not a party, but also, for that reason, declined to grant any order affecting the rights of such person.

The question, therefore, whether the judgment obtained by Desportes against Hunter is valid is still an open question, at least so far as the rights of Ruff are concerned. That judgment was obtained under proceedings which, upon their face, were entirely regular, and there was nothing whatever in the record to indicate any vice or even irregularity therein. It appears from the recitals made in the order for judgment granted by Judge Kershaw that every step required by law as necessary to the rendition of such judgment had been regularly taken. The only vice, or even informality, that is now suggested in that judgment is, that in mailing a copy of the summons to the said Hunter, it was addressed to him at Leon, state of Nicaragua, Central America, instead of at the city of Jenotepe, in the Republic of Nicaragua, Central America, which it is now claimed was the place of residence of said Hunter, and that he never received any copy of the summons or notice of the action. The fact that Hunter never received any copy of the summons is not, and cannot be pretended, sufficient to avoid the judg-

ment, for our statute does not require anything of the kind; and such a requirement would in many, if not in most, cases render a proceeding by attachment nugatory; for if a plaintiff were ⁵⁴⁹ required to show that an absent debtor, residing in a distant country, or even in an adjoining state, actually received the copy of the summons mailed to him at his place of residence, under the penalty of having his judgment rendered void, it is very manifest that the salutary and necessary remedy by attachment would become practically useless.

The only inquiry, therefore, is, whether the mistake in mailing a copy of the summons to Hunter at Leon, in the state of Nicaragua, Central America, instead of at the city of Jenotepe, in the Republic of Nicaragua, where it now appears that Hunter had his residence, renders the judgment so absolutely void that no rights can be acquired under it. The provision of our statute requiring "a copy of the summons to be forthwith deposited in the postoffice, directed to the person to be served, at his place of residence, unless it appear that such residence is neither known to the party making the application nor can, with reasonable diligence, be ascertained by him," must, from the very nature of the case, receive a reasonable if not a liberal construction. If a creditor whose debtor, leaving property behind, has left this state and acquired a residence in a distant state—in this case in a far distant foreign country—cannot avail himself of a remedy for the collection of his debt out of the property left in this state, unless he first obtains certain knowledge of the new residence of his debtor, the remedy would in many, if not most, cases become fruitless. Indeed, the very terms of the statute show that all that is required of the creditor is "reasonable diligence" to ascertain the place of residence of his debtor. This necessarily implies inquiry from others, and warrants action upon information thus acquired. These views are supported by authority. In 16 American and English Encyclopedia of Law, 820, it is said: "The notice must be mailed to the party at the address stated in the order of publication; a mailing to a different address will not be sufficient; but if the address stated in the order, or the affidavit to procure the order, is not, in fact, the correct one, judgment obtained thereon will ⁵⁵⁰ not be void, if the plaintiff acted in good faith": Citing *Martin v. Pond*, 30 Fed. Rep. 15, which has been examined and found to sustain fully the text. It is a decision rendered by Judge Brewer, now one of the associate justices of the supreme court of the United States.

So in Vanfleet's Collateral Attack, 482, it is said: "A copy of a summons mailed to a place where the defendant did not reside . . . by reason of which he did not get the notice mailed to him, does not make the proceeding void," citing *Martin v. Pond*, 30 Fed. Rep. 15. In *Fowler v. Whitman*, 2 Ohio St. 270, where publication for nonresidents was ordered, and plaintiff was directed to mail a copy of the paper containing the notice to them, if their address was known, and the nonresidents, in an action of ejectment, offered to show that their address was known to plaintiff, who did not mail a copy to them, it was held that as the court, in the original suit, had found that publication had been duly made, such finding was conclusive on the nonresidents. In this case Judge Kershaw, in his order for judgment, had found that a copy of the summons had been duly mailed to the defendant, Hunter, addressed to him at Leon, State of Nicaragua, Central America, "his place of residence." In *Weber v. Weitling*, 18 N. J. Eq. 441, where a bill was filed to set aside a sale of real estate under attachment proceedings, on the ground that the defendant, who was a resident, had been sued as a nonresident, the court held, that the foundation of the proceeding and of the jurisdiction of the court was not the nonresidence of the defendant, but the affidavit of the plaintiff's belief of his nonresidence; and the affidavit having been made in good faith, and appearing regular on its face, the court could not declare the proceedings void. In *Freeman on Judgments*, section 126, quoted with approval in *Darby v. Shannon*, 19 S. C. 537, and again in *Eason v. Witcofskey*, 29 S. C. 246, it is said: "There is a difference between a want of jurisdiction and a defect in obtaining jurisdiction. . . . In case of an attempted service, the presumption exists that the court considered ⁵⁵¹ and determined the question whether the acts done were sufficient or insufficient. If so, the conclusions reached by the court, being derived from hearing and deliberating upon a matter which, by law, it was authorized to hear and decide, although erroneous, are not void. When, in a proceeding by attachment, the ground required by the statute for the issuing of the process had been laid, and the process has been issued and executed, the jurisdiction of the court is complete. Where there has been an insufficient publication, or an entire failure to publish, the proceedings are not so invalidated as to be made void." Now, in the case under consideration, the presumption here spoken of has become a fact; for it is recited in Judge Kershaw's order for

judgment that a copy of the summons was duly mailed to the defendant, at "his place of residence"; and even if such finding of fact should afterward turn out to be erroneous, that will not render the judgment void. Inasmuch as it clearly appears that all the proceedings leading up to the judgment under which the land in controversy was sold were entirely regular upon their face, and disclosed no vice nor infirmity of any kind; and inasmuch as it appears from the statements in the "case" that Desportes, the plaintiff in such judgment, made efforts, by inquiry, to ascertain the place of residence of the defendant therein, and, in good faith, acted upon the information thus acquired, we cannot think that the fact that it has been made to appear, since the sale by the sheriff, and since the payment of the purchase money by the appellant, that the information thus acquired by Desportes was erroneous, and that, in fact, the city of Jenotepe, instead of the city of Leon, was the place of residence of defendant, Hunter, can be sufficient to require the court to declare the said judgment absolutely void, and to invalidate all proceedings thereunder, even against an innocent third person who has been induced to pay out his money, in reliance upon a judgment entirely regular upon its face, and not even indicating any infirmity of any kind in it. While it is quite true, as contended for ⁵⁵² by respondent's counsel, that the proceedings before Judge Fraser, culminating in an order setting aside the judgment, became a part of the record, yet it must be remembered that these proceedings were not even commenced until some time after the sheriff's sale, under which appellant claims, was made; and at that time there was nothing in the record, or elsewhere, so far as the "case" shows, to even suggest that there was any vice, or even irregularity, in the judgment. But, again, in 1 Black on Judgments, section 218, it is said: "The result deducible from a majority of the cases seems to be that it is only when the judgment appears upon its face to have been rendered without jurisdiction that it can be considered a nullity for all purposes." And in Freeman on Judgments, section 116, quoted with approval in our own case of *Turner v. Malone*, 24 S. C. 403, that author states what he considers the most approved view, as follows: "It has often been said that a judgment is void whenever the court which pronounced it had not jurisdiction of the parties to the judgment, or of the subject matter in controversy. This is, undoubtedly, true everywhere, provided the want of jurisdiction is not controverted, or is manifest from an inspec-

tion of the record. It is also true in some of the states, even though the jurisdictional facts are asserted in the record. The weight of adjudged cases, however, sustains the proposition that the judgment of a domestic court of general jurisdiction is not void except where the court has no jurisdiction over the subject matter of the suit, or where, having such jurisdiction over the subject matter, it is shown by the record (italics ours) to have had no jurisdiction over the judgment defendant. . . . The word 'void' can with no propriety be applied to a thing which appears to be sound, and which, while in existence, can command and enforce respect, and whose infirmity cannot be made manifest. A judgment rendered without in fact bringing the defendants into court, unless the want of authority over them appears in the record (italics ours) is no more void than if it were founded upon a mere misconception of some ⁵⁵³ matter of law or of fact occurring in the exercise of an unquestionable jurisdiction. In either case the judgment can be avoided and made functus officio by some appropriate proceeding instituted for that purpose; but, if not so avoided, must be respected and enforced." See, also, *Voorhees v. Bank of United States*, 10 Pet. 478, where Mr. Justice Baldwin, in delivering the opinion of the court, speaking of the rights of purchasers at a sale made under judicial process, uses this language: "The purchaser is not bound to look beyond the decree when executed by a conveyance, if the facts necessary to give jurisdiction appear on the face of the proceeding, nor look further back than the order of the court." So in *Cooper v. Reynolds*, 10 Wall. 308, in delivering the opinion of the court, Mr. Justice Miller, speaking of a sale of property which had been attached, uses this language: "Now, in this class of cases, on what does the jurisdiction of the court depend? It seems to us that the seizure of the property, or that which in this case is the same in effect, the levy of the writ of attachment on it, is the one essential requisite to the jurisdiction, as it unquestionably is in the proceedings purely in rem. Without this the court can proceed no further; with it the court can proceed to subject that property to the demand of plaintiff"; and after speaking of the effect of a defective affidavit upon which the writ of attachment was issued, which might render the judgment reversible for error, says: "We are unable to see how that can deprive the court of jurisdiction acquired by the writ levied upon defendant's property. So, also, of the publication of no-

tice. It is the duty of the court to order such publication, and to see that it has been properly made, and, undoubtedly, if there has been no such publication, a court of errors might reverse the judgment. But when the writ has been issued, the property seized, and that property been condemned and sold, we cannot hold that the court had no jurisdiction for want of a sufficient publication of notice." Upon the same principle we would say that where as in this case, there subsequently appears to have been an ⁵⁵⁴ honest mistake in mailing a copy of the summons to the defendant at the city of Leon, which plaintiff, after inquiry, was informed was defendant's place of residence, instead of mailing such copy to him at the city of Jenotepe, which, it has subsequently been made to appear, was, in fact, his place of residence, cannot deprive the court of jurisdiction over the property acquired by a levy of the attachment thereon. The comments of Justice Brown, on the case of *Cooper v. Reynolda*, 10 Wall. 308, in the subsequent case of the *Guaranty Trust etc. Co. v. Green Cove etc. R. R. Co.*, 139 U. S. 137, cannot affect the former, because it was distinguished from the latter by the fact that, in *Cooper v. Reynolda*, 10 Wall. 308, the property in question was seized under a writ of attachment, a proceeding in rem, while in the latter case there was no attachment. So, too, in our own case of *Trapier v. Waldo*, 16 S. C. 276, relied on by the circuit judge as well as by counsel for respondents, there was no attachment; and, moreover, in that case, the record not only failed to show that Gertrude Waldo and her infant son, Rhinelander, had been properly made parties, but rather showed to the contrary. We are, therefore, of opinion that even if the fact be that a copy of the summons was not mailed to the judgment debtor at his correct place of residence, but was mailed to him at the place which the judgment creditor, after inquiry, was informed was his place of residence, such fact did not render the judgment so absolutely void as to render all proceedings under it nullities; but, at most, only rendered the judgment voidable, and liable to be declared void when such fact was made to appear in a subsequent proceeding instituted for that purpose; but such subsequent showing cannot be allowed to affect the validity of any proceedings taken under such judgment before such showing has been made: *Turner v. Malone*, 24 S. C. 404; *Gregg v. Bingham*, 1 Hill, 302; 26 Am. Dec. 181; *Simms v. Slacum*, 3 Cranch, 300; at least, so far as the rights of third persons are concerned. But, in addition to this, it seems to

us that the legislature, recognizing the hardship and injustice which an innocent purchaser, who ⁵⁵⁵ has bought property under a judgment regular on its face, would suffer, if the owner of such property should be allowed to come in afterward, and, by showing that there was some hidden vice in the judgment, have the same, and all proceedings thereunder, set aside, has made express provision for the protection of such purchaser from such hardship and injustice. In the third paragraph of section 156 of the Code of Procedure the provision is, that "the defendant against whom publication is ordered may upon good cause shown, be allowed to defend after the judgment, or at any time within one year after notice thereof, and within seven years after its rendition, on such term as may be just; and if the defense be successful, and the judgment, or any part thereof, has been collected or otherwise enforced, such restitution may thereupon be compelled as the court directs; *but the title to the property sold under such judgment to a purchaser in good faith shall not be thereby affected.*" The circuit judge holds that the saving clause, which we have italicised, inserted for the protection of innocent purchasers, was intended only for the protection of one who has purchased under a judgment obtained in a case where the judgment debtor "has been duly and legally served by publication, over whose person the court acquired jurisdiction, and against whom judgment has been rendered." It would be sufficient to say that such is not the language of the statutory provision; and to give it the construction adopted by the circuit judge, it would be necessary to interpolate words into the statute which the legislature has not seen fit to insert therein. The section of the code (156) in which the provision here in question is found, after providing in what cases a defendant may be made a party to an action by publication, and after providing that in such cases the court may grant an order that service may be made by publication, and after providing that certain other things should be done, provides, in the third paragraph of the section, that "the defendant against whom publication is ordered"—not the defendant who has ⁵⁵⁶ been duly and legally served by publication—may, on sufficient cause shown, be allowed to come in and defend, etc.; but that when he does so, and he seeks to assail a judgment recovered against him in his absence, he cannot be allowed to divest rights of innocent purchasers, which had vested before any assault had been made upon the judgment, which upon its face was entirely regular and

free from any infirmity. We, therefore, must conclude that the circuit judge erred in holding that the judgment recovered by Desportes v. Hunter was so absolutely void as that the appellant, Ruff, acquired no title by his purchase at the sheriff's sale made under said judgment.

Under this view, the other questions raised in the argument become wholly immaterial, and need not, therefore, be considered.

The judgment of this court is, that the judgment of the circuit court in each of the cases mentioned in the title of this opinion be reversed, and that the complaints in each of said cases be dismissed.

Upon filing of petition for rehearing, remittitur stayed. Petition refused, on ground that no material fact had been overlooked, on the 30th of November, 1896, and stay of remittitur revoked.

JUDGMENT—CONCLUSIVENESS OF.—When a court has jurisdiction, it has the right to settle every question which occurs in the cause, and, whether its decision be correct or not, its judgment, until reversed, is regarded as binding in every other court: *Barrick v. Horner*, 78 Md. 253; 44 Am. St. Rep. 283, and note; *Freeman v. McAninch*, 87 Tex. 132; 47 Am. St. Rep. 79.

JUDGMENTS—VALIDITY OF, WHEN BASED UPON SERVICE BY PUBLICATION.—Judgments rendered upon constructive service by publication are given the same conclusive effect and are entitled to the same favorable presumptions as judgments upon personal service: *Hardy v. Beaty*, 84 Tex. 562; 31 Am. St. Rep. 80, and note. The omission of the name of the defendant's postoffice in the affidavit upon which the warning order is made will not invalidate a judgment rendered upon constructive service of process: *Carr v. Carr*, 92 Ky. 552; 36 Am. St. Rep. 614. See extended note to *Hahn v. Kelley*, 94 Am. Dec. 764, and monographic note to *Morrill v. Morrill*, 23 Am. St. Rep. 115.

JUDGMENTS—RIGHTS OF BONA FIDE PURCHASERS.—Every doubt should be resolved in favor of the validity of a judgment, where the rights of bona fide purchasers are involved: *McGowan v. Lufburrow*, 82 Ga. 523; 14 Am. St. Rep. 178. See, also, *Hudepohl v. Hill Water etc. Co.*, 94 Cal. 588; 28 Am. St. Rep. 149, and note; *Keynolds v. Harris*, 14 Cal. 667; 76 Am. Dec. 459.

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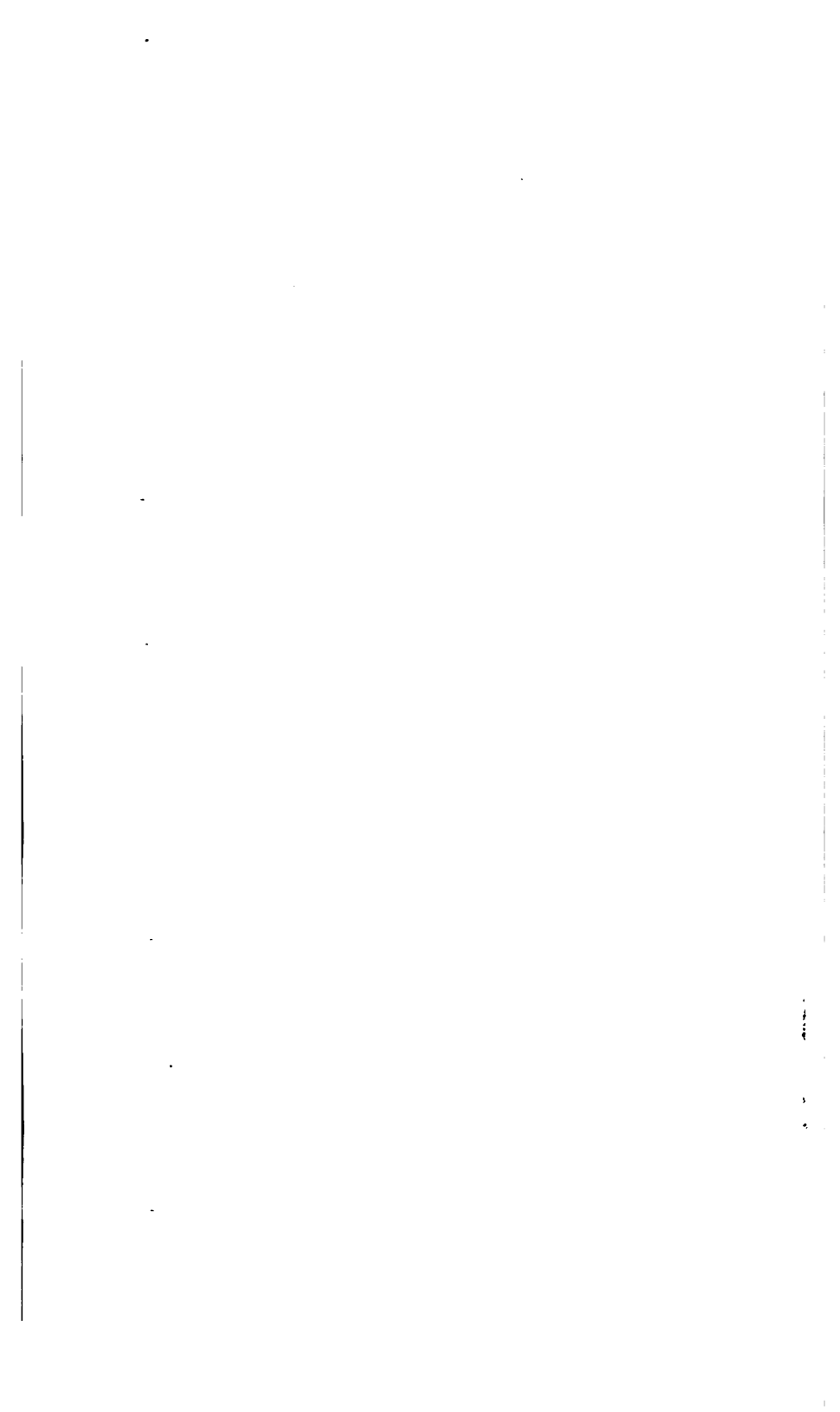
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3. **TRIALS—EVIDENCE.**—The order of proof is always within the discretion of the trial court, and will not be interfered with by the appellate court, unless there has been an abuse of discretion. (*Kindel v. Le Bert*, 234.)

4. **RULES OF COURT.—JUDICIAL NOTICE** cannot be taken by an appellate court of rules adopted by a trial court, and the party asserting the existence of a rule of such court, and that he has been prejudiced by its violation, should make it a part of the record on appeal. (*Kindel v. Le Bert*, 234.)

5. APPELLATE PRACTICE.—Instructions clearly relating to matters of law involved in a case as shown by the pleadings independent of the evidence may be reviewed on appeal, although none of the evidence is presented by the record. (*Seevers v. Gabel*, 381.)

6. APPELLATE PRACTICE—ORDER INVOLVING MERITS.—An order overruling a motion to strike out matter setting up an essential element of the validity of a mortgage sued on, is "an intermediate order involving the merits," and may be appealed from. (*Seiffert etc. Lumber Co. v. Hartwell*, 413.)

7. APPEAL—WHAT CANNOT BE FIRST RAISED UPON.—That there was a waiver, by answering over after the overruling of a demurrer, is an objection which cannot first be urged on appeal. (*Tyler v. Coulthard*, 452.)

8. APPELLATE PRACTICE—INTEREST.—If the right to recover interest is conceded by both parties upon the trial, the allowance thereof cannot be assigned as error on appeal. (*Reed v. Western Union Tel. Co.*, 609.)

9. APPELLATE PRACTICE—SPECIAL JUDGE—WAIVER OF OATH.—A party who waives the taking of the oath of office by a special judge cannot afterward be heard to object that such oath was not taken. (*State v. Van Wye*, 627.)

10. APPEAL.—IT IS SUCH ERRORS ONLY as the appellant complains of that can be considered on appeal. (*Dennis v. Caughlin*, 761.)

11. APPEAL—FINDINGS NOT SUPPORTED BY EVIDENCE.—AN ASSIGNMENT OF ERROR that findings are not supported by the evidence will be disregarded, if the record contains no specification of the particulars in which the evidence is claimed to be insufficient to support the findings. (*Gude v. Dakota Fire etc. Co.*, 860.)

12. APPELLATE PRACTICE—REFUSAL TO GIVE REQUESTED CHARGE.—The supreme court may consider on appeal whether the trial court has erred in refusing to charge a proposition of law because it was presented in a request alleged to have been framed in disregard of a technical requirement of a rule of court, provided such refusal was not based upon a failure to comply with such technical requirement. (*Wragge v. South Carolina etc. R. R. Co.*, 870.)

13. APPELLATE PRACTICE.—ERROR CANNOT BE BASED upon the failure of the trial court to define a statutory term, when no request to that effect was made. (*Wragge v. South Carolina etc. R. R. Co.*, 870.)

ARREST.

See Malicious Prosecution, 1, 3.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

1. AN ASSIGNMENT FOR THE BENEFIT OF CREDITORS made by a debtor after garnishment proceedings have been commenced against him is voluntary, and not involuntary. (*Hawkins v. Ireland*, 534.)

2. ASSIGNMENT FOR BENEFIT OF CREDITORS.—FRAUD IN FACT WHICH VITIATES ASSIGNMENTS must be in the assignment itself. Hence, frauds in separate and independent transactions do not affect subsequent assignments for the benefit of creditors. (*Bank of Little Rock v. Frank*, 65.)

3. ASSIGNMENT FOR BENEFIT OF CREDITORS—WAIVER OF FRAUD.—If a debtor commits a fraud in the purchase of goods, no one can take advantage of it except the creditor affected, and he waives the fraud by suing for the purchase money. Hence, all creditors who attack an assignment, made by their debtor for the benefit of creditors, as fraudulent, and who are affected by such fraud, waive it by suing for the purchase money. (*Bank of Little Rock v. Frank*, 65.)

4. ASSIGNMENT FOR BENEFIT OF CREDITORS—FRAUD. PROMISE OF PREFERENCE.—A fraud that will avoid an assignment for the benefit of creditors must be in the assignment itself, and, as a debtor has a right to prefer creditors, no promise made by him, in borrowing money, to prefer the lender in a deed of assignment, should he be compelled to make one, will invalidate the assignment for fraud, when made with such a preference. (*Bank of Little Rock v. Frank*, 65.)

5. ASSIGNMENT FOR BENEFIT OF CREDITORS—PREFERENCE OF ATTORNEY, WHEN VOID.—A provision, in an assignment for the benefit of creditors, to prefer an attorney at law, in a given sum, for services to be rendered in upholding and enforcing the assignment, is fraudulent in law, and void, although a part of such amount is to pay for past services, because it deprives the assignee and the court of their discretion in determining the necessity of employing an attorney, and the amount of his compensation. (*Bank of Little Rock v. Frank*, 65.)

6. ASSIGNMENT FOR BENEFIT OF CREDITORS THOUGH VOID IN PART IS NOT VOID IN TOTO.—A whole assignment for the benefit of creditors is not made void by a preference therein which is fraudulent in law and void, where no actual fraud was intended, and the void stipulation giving such preference can be eliminated from the deed of assignment without defeating the general intent of the instrument. (*Bank of Little Rock v. Frank*, 65.)

See Fraudulent Conveyances, 1.

ATTACHMENT.

1. GARNISHMENT OF JOINT DEBT.—Under a writ of execution or attachment against one defendant, his interest in a debt due jointly to himself and another may be garnished. (*Moore v. Gilmore*, 20.)

2. GARNISHMENT OF JOINT DEBT, PARTIES ESSENTIAL TO.—If it is sought to garnish the interest of a debtor in a debt due to himself and others, the other persons interested with him should be made parties to the proceeding, to the end that the defendant's interest in the joint debt may be ascertained and that the proceedings may not result to the prejudice of the co-owners with him of the debt. Under a statute providing that a court, if a complete determination of a controversy cannot be had without prejudice to the rights of persons not before it, shall cause them to be brought in, the court may, in garnishment proceedings, bring before it persons who are jointly interested with the defendant in the debt sought to be garnished. (*Moore v. Gilmore*, 20.)

3. CORPORATIONS—INSOLVENCY—PREFERENCES.—THE LEVY OF AN ATTACHMENT against an insolvent corporation is not affected by a subsequent statute prohibiting preferences among the creditors of insolvent corporations. (*Davis v. H. B. Clafin Co.*, 102.)

4. AN ATTACHMENT ISSUED UPON A DEBT NOT DUE MAY BE AVOIDED by a junior attaching creditor, and postponed to his attachment lien, where there is no statute authorizing the issuance of an attachment for a debt not due. (*Davis v. H. B. Clafin Co.*, 102.)

5. ATTACHMENT, WHEN CONSTRUCTIVELY FRAUDULENT AS AGAINST JUNIOR ATTACHING CREDITORS.—If a creditor sues out an attachment upon the allegation that his debtor has fraudulently disposed of property with the intent to hinder and delay creditors, when such allegation is, in fact, false, and there is no ground for the attachment, it is such a violation of law as amounts to a constructive fraud upon junior attaching creditors, who may intervene for the purpose of having such prior attachment subordinated to their liens. (*Davis v. H. B. Clafin Co.*, 102.)

6. PROCESS.—IT IS A MALICIOUS ABUSE OF LEGAL PROCESS for a creditor to direct a sheriff to serve an execution by garnishment for a debt due for personal earnings exempt from execution. (*Nix v. Goodhill*, 434.)

7. PROCESS, ABUSE OF—GARNISHMENT OF EXEMPT WAGES.—AN ACTION will lie against one who maliciously, and without probable cause, garnishes exempt earnings of his judgment debtor; and there is malice and want of probable cause, where the creditor knows such earnings to be exempt, but seeks to coerce the debtor into payment, out of his exemption, to avoid discharge by his annoyed employer. (*Nix v. Goodhue*, 434.)

8. ATTACHMENT—GARNISHMENT AS A LIEN.—A notice of garnishment served upon a debtor gives the creditor a right of action against the garnishee for money or property in his hands, owing or belonging to the party against whom the writ runs; but it does not create a lien on all the garnishee's property which may subsequently be delivered in payment of the debt. (*Hulley v. Chedic*, 729.)

9. ATTACHMENT—GARNISHMENT AS A LIEN.—A notice of garnishment served upon a debtor does not give the creditor any lien upon money with which the garnishee may subsequently pay his debts, or enable the garnisher to follow the money into the hands of third persons, to whom it has been paid, especially where it does not come from the garnishee, but is obtained by him through the assignment of a judgment founded upon the debt against which the garnishment has been levied. (*Hulley v. Chedic*, 729.)

10. JURISDICTION, METHOD OF ACQUIRING OVER PERSONS NOT PARTIES TO GARNISHMENT PROCEEDINGS.—Under a section of the code providing that when jurisdiction is given to a court, all means to carry it into effect are also given, and where the mode of proceeding is not specifically pointed out, authorizing the court to adopt any process or proceeding which may appear most conformable to the spirit of the code, the court may issue suitable process or notice requiring persons who claim to be interested jointly with a debtor in a debt due him and them, which is sought to be garnished, to appear before it for the purpose of having the defendant's interest in such joint debt determined. (*Moore v. Gilmore*, 20.)

See Assignment for Benefit of Creditors, 1; Vendor and Purchaser.

ATTORNEY AND CLIENT.

1. ATTORNEY AND CLIENT—MONEY COLLECTED AS TRUSTS—LIMITATIONS.—If money collected by an attorney for a client is retained by the former, the fund does not constitute a continuing trust in the absence of fraud, nor prevent the running of the statute of limitations in favor of the attorney. On the contrary, the statute begins to run from the time that the receipt of the money by the attorney is known to the client, without regard to demand made by the latter. (*Schofield v. Woolley*, 315.)

2. ATTORNEY AND CLIENT—COLLECTIONS—STATUTE OF LIMITATIONS.—If an attorney collects money for his client in settlement of litigation instituted by him, and the client refuses to ratify the settlement or to receive the money, and institutes proceedings to set aside the settlement, and the attorney retains the money collected during the pendency of such proceedings, the repudiation of his act in collecting the money does not stop the running of the statute of limitations against an action to recover the money from him, especially when the proceedings to set aside the settlement are not instituted on reasonable or plausible grounds, and result in sustaining the act of the attorney. (*Schofield v. Woolley*, 315.)

3. ATTORNEY AND CLIENT—COLLECTIONS—STATUTE OF LIMITATIONS.—The fact that an attorney after collecting money for his client retains it, and informs his client in writing that he has collected it and will pay it over as soon as he has paid certain contingent fees chargeable against it, does not stop the running of the statute of limitations against an action to recover the money from him, although such contingent fees were never paid. (*Schofield v. Woolley*, 315.)

See Acknowledgment, 2; Assignment for Benefit of Creditors, 5; Guardian and Ward, 10.

AUSTRALIAN BALLOT LAW.

See Elections, 5-7.

BANKS AND BANKING.

BANKS AND BANKING—REFUSAL TO HONOR CHECK—SLANDER IN BUSINESS—DAMAGES.—The wrongful refusal of a bank to honor the check of a trader or merchant, when it has sufficient of his funds on deposit to pay such check, is a slander to him in his business for which he is entitled to recover compensatory damages. (*Svendsen v. State Bank*, 522.)

BATHHOUSE KEEPERS.

See Negligence, 5-7.

BILLS OF LADING.

See Carriers, 8, 9, 13.

BONA FIDE PURCHASERS.

See Agency, 1; Deeds, 4; Judgment, 3, 17, 25, 26; Mortgages, 12.

BOUNDARIES.

See Equity, 1, 3-5.

BURDEN OF PROOF.

See Animals, 4; Criminal Law, 2; Insurance, 21, 23; Receivers, 8; Telegraph Companies, 2; Wills, 3.

CARRIERS.

1. CARRIERS.—BAGGAGE is whatever the passenger takes with him for his personal use or convenience, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or to the ultimate purpose of the journey. (*Kansas City etc. Ry. Co. v. McGahey*, 111.)

2. CARRIERS—LIABILITY FOR ARTICLES RECEIVED AS BAGGAGE.—If articles are presented to a carrier, by a passenger, who demands their transportation as his luggage, and the carrier is informed by the passenger, or has knowledge, from the outward appearance of the articles, that they are not usually carried as baggage, but receives and carries them as such, he is answerable for them as baggage, although he was not bound to receive them as such. (*Kansas City etc. Ry. Co. v. McGahey*, 111.)

3. RAILROADS—LIABILITY FOR BAGGAGE ENDS, WHEN. A railroad company, as a common carrier, is answerable, as an insurer, for the baggage of a passenger until it is ready to be delivered to the owner at the place of his destination, and until he has had a reasonable time and opportunity to come and take it away. If it is not called for in a reasonable time, the company may store it in a secure warehouse, when it becomes a mere warehouseman, with

correspondingly diminished duties as to the exercise of care. (Kansas City etc. Ry. Co. v. McGahey, 111.)

4. CARRIERS—REMOVAL OF BAGGAGE—TIME.—What constitutes a reasonable time and opportunity for a passenger to remove his baggage is, ordinarily, a mixed question of fact and law. If the facts are in dispute, it must be determined by the jury from the peculiar circumstances of each particular case; otherwise, it is a question of law for the court. (Kansas City etc. Ry. Co. v. McGahey, 111.)

5. CARRIERS—CALLING FOR BAGGAGE—POSTPONEMENT OF TIME.—A passenger cannot extend the strict and rigid liability of a common carrier, as an insurer, by postponing the time of taking possession of his baggage, for his own convenience, on account of its arrival at a late hour of the night, or his peculiar circumstances. (Kansas City etc. Ry. Co. v. McGahey, 111.)

6. CARRIERS—LIABILITY FOR LOSS OF BAGGAGE STORED IN A WAREHOUSE.—If a passenger fails to remove his baggage within a reasonable time after its arrival at his destination, and it is stored by the carrier in a warehouse, where it is soon afterward destroyed by fire, he cannot recover for its loss until he shows that the carrier has been guilty of such negligence as would make the latter answerable as a warehouseman for hire. (Kansas City etc. Ry. Co. v. McGahey, 111.)

7. CARRIERS—EXPRESS MATTER AND MESSENGERS—CONTRACTS EXEMPTING FROM LIABILITY.—A railway company, while carrying goods for an express company under special contract, is a private and not a common carrier, and may, by contract between the express company, its messengers, and itself, exempt itself from liability for injury to such messengers, however caused, while they are in charge of express matter on its trains. (Louisville etc. Ry. Co. v. Keefer, 348.)

8. CARRIERS.—STIPULATION IN BILLS OF LADING RESTRICTING the common-law liability of carriers are invalid unless reasonable. (Dixie Cigar Co. v. Southern Express Co., 795.)

9. CARRIERS—RESTRICTION UPON LIABILITY WHEN UNREASONABLE AND INVALID.—A stipulation in a bill of lading that a carrier shall not be liable for any loss or damage, unless the claim therefor shall be presented in writing at the office of the carrier within thirty days after the date of such bill is unreasonable and void. (Dixie Cigar Co. v. Southern Express Co., 795.)

10. CARRIERS—CONTRACTS LIMITING LIABILITY FOR NEGLIGENCE.—A railroad company while performing its duty as a common carrier, cannot protect itself by contract from liability for negligence to a passenger. (Louisville etc. Ry. Co. v. Keefer, 348.)

11. CARRIERS—CLAIM AND DELIVERY FOR DAMAGED GOODS—EVIDENCE.—In an action against a carrier for the possession of goods damaged while in his hands, evidence as to the condition of the goods for a considerable time after their arrival at their destination and up to the time of judgment is admissible. (Miami Powder Co. v. Pt. Royal etc. Ry. Co., 880.)

12. CARRIERS—FREIGHT—DAMAGES FOR FAILURE TO DELIVER.—The title to goods in the hands of a carrier is in the freighter or consignee, and, if the damage to that property by fault of the carrier while in his hands equals or exceeds the freight, the owner may sue the carrier for damages, or he may maintain an action for claim or delivery of the goods and for damages, without first paying the freight charges. (Miami Powder Co. v. Pt. Royal etc. Ry. Co., 880.)

13. CARRIERS—BILLS OF LADING—INNOCENT PLEDGEE.—If a shipper consigns goods to himself and receives a bill of lading to that effect from the carrier, who delivers them with a proper way bill to a connecting carrier, who, at the shipper's request, delivers

them to him at an intermediate point in transit without requiring the cancellation or surrender of the bill of lading, and the shipper, before the goods could have arrived at their original destination, pledges such bill of lading in the usual course of business to an innocent pledgee for value, the connecting carrier is liable to such pledgee for failure to deliver the goods at their original destination, and is estopped from showing such intermediate delivery to the original shipper. (*Ratzer v. Burlington etc. R. R. Co.*, 530.)

CHATTEL MORTGAGES.

-A CHATTEL MORTGAGE ON SHEEP DOES NOT INCLUDE THE WOOL THEREON nor their increase in gestation at the date of the mortgage, where neither such wool nor increase was specially mentioned in the instrument, though the statute authorizes the execution of such mortgages upon sheep and the increase thereof. (*First National Bank v. Erreca*, 183.)

CHECKS.

See Banks and Banking.

CLOUD ON TITLE.

1. CLOUD ON TITLE—ACTION TO QUIET TITLE—TAX SALE CLAIMANT AS DEFENDANT.—Under a statute authorizing any person to bring an action "against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim," the holder of a certificate of purchase of land at a tax sale, which entitles him to a deed of such land at the maturity of the certificate, claims such "an estate or interest" in the land as will support an action against him to quiet title. (*Clark v. Darlington*, 835.)

2. CLOUD ON TITLE—ACTION TO QUIET TITLE—COMPLAINT AGAINST TAX SALE CLAIMANT—GENERAL DEMURRER.—If the owner of land brings an action to quiet title against one who claims an interest in the land by virtue of an alleged purchase thereof at a tax sale, and it does not appear upon the face of the complaint, either expressly or by implication of law or fact, that any taxes were or are due upon the land, the complaint is not subject to a general demurrer on the ground that it does not contain an offer to pay whatever taxes may be justly found due on the land. (*Clark v. Darlington*, 835.)

3. CLOUD ON TITLE—ACTION TO QUIET TITLE—COMPLAINT AGAINST TAX SALE CLAIMANT—CAUSE OF ACTION.—A complaint under a statute authorizing any person to bring an action "against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim," states a cause of action where it alleges that the plaintiff is the absolute and unqualified owner in fee simple; that the defendant, wrongfully and without right, claims an interest in the land described by virtue of an alleged purchase thereof at a tax sale; that said claim is unjust and wrongful, and without any foundation in law or fact, and that said claim is made adversely to the ownership and title of the plaintiff; although it does not particularly set out the facts upon which the invalidity of the tax sale and certificate is claimed. (*Clark v. Darlington*, 835.)

4. TAX DEEDS—CLOUD UPON TITLE.—Where plaintiff, in an action to quiet title, deposits in court the moneys paid out under a void tax sale, he is entitled to have the cloud cast upon his title by such sale removed. (*Emerson v. Shannon*, 232.)

COLOR OF TITLE.

See Adverse Possession.

CONDITIONS.

See Contracts, 2; Insurance, 1; Negotiable Instruments, 6, 7.

CONFLICT OF LAWS.

See Insurance, 2; Telegraph Companies, 4.

CONSTITUTIONAL LAW.

See Statutes, Corporations, 2; Counties, 3; Criminal Law, 8; Elections, 17; Estates, 1; Municipal Corporations, 2, 3; Railroad Companies, 8; Taxes, 11.

CONTRACTS.

1. **CONTRACTS—EFFECT OF VOID PROVISION WHERE CONTRACT IS INDIVISIBLE.**—If the lawful and the unlawful parts of a contract cannot be separated, so as to enforce the one and annul the other, the contract will be declared null and void throughout. (Edwards v. Randle, 108.)

2. **CONDITIONS PRECEDENT CALL** for the performance of some act or the happening of some event after a contract is entered into and upon the performance or happening of which its obligations are made to depend. (Chambers v. Northwestern etc. Ins. Co., 549.)

3. **CONTRACTS—SALE OF OFFICE—PUBLIC POLICY.**—IF A POSTMASTER agrees to sell his postoffice fixtures, to resign, and to recommend the appointment of his vendee as his successor, the contract is void as against public policy, and money paid on it cannot be recovered upon the failure of the postmaster to perform. (Edwards v. Randle, 108.)

See Agency, 2; Sales, 3.

CONVERSION.

See Trover.

CONVEYANCES.

See, Agency, 1; Deeds.

CORPORATIONS.

1. **CORPORATIONS.—THE FAILURE OF A CORPORATION TO COMPLETE ITS ORGANIZATION** within the time directed by law cannot be taken advantage of in a collateral proceeding. (Boyd v. Redd, 792.)

2. **CONSTITUTIONAL LAW.—CORPORATIONS ARE NOT "PERSONS"** within the meaning of a constitutional provision providing that no person shall be deprived of the natural right to life, liberty, and the enjoyment of the gains of his own industry; nor does such provision restrict the right of the state to prescribe conditions upon which foreign corporations may transact business within its limits. (Daggs v. Orient Ins. Co., 638.)

3. **CORPORATIONS. DISSOLUTION OF. PROPERTY OF. TITLE DOES NOT RETURN TO GRANTOR.**—If a corporation ceases to exist, real property conveyed to it does not return to the grantor nor to his heirs. This remains true, though at the execution of the conveyance, the time during which the corporation could continue was fixed by law, and such time has expired. (Wilson v. Leary, 778.)

4. **CORPORATION—COST OF PROPERTY.**—If promoters of a corporation receive an option entitling them to purchase property

at a price specified, and then convey it to another person for a much greater pretended consideration, he giving his notes for the pretended purchase price, and afterward conveying the property to the corporation for a still greater purported consideration, it assuming the payment of the notes executed by him to his immediate grantor, and all such notes are afterward delivered to the corporation, and canceled as having been paid, when no payment had been made thereon, a statement that the property cost the sum named in the deed to the corporation is false, and the true cost is the sum at which the promoters were entitled to purchase it of the original vendor. (*Zang v. Adams*, 249.)

5. CORPORATIONS, SUBSCRIPTION TO OBTAINED BY FRAUD.—One who is induced to subscribe for stock in a corporation by fraudulent misrepresentations of one of its officers is entitled to be released from such subscription and to defend an action upon a promissory note given for the amount thereof, if the officer acted as agent of the corporation in securing the subscription, or if it has ratified his acts by knowingly accepting the purchase money and applying the same to its use. (*Zang v. Adams*, 249.)

6. FRAUD, MISSTATEMENT AS TO COST OF PROPERTY.—A statement by an agent of a corporation that the property constituting its sole assets cost it a designated sum is not a mere expression of opinion by him as to its value. It is a representation as to a material fact, and if it is false and induces a subscription to the capital stock of the corporation, the subscriber is entitled to be released therefrom. (*Zang v. Adams*, 249.)

7. FALSE REPRESENTATIONS, THE TRUTH OF WHICH CAN BE ASCERTAINED.—The fact that a subscriber to the capital stock of a corporation might, by investigating the records in a public office in a county in which its property is situate, have ascertained that the representations made to him respecting the cost of such property were false, does not deprive him of the right to rescind his contract of subscription because of such misrepresentations. (*Zang v. Adams*, 249.)

8. CORPORATIONS—STOCKHOLDER'S RIGHT TO RESCIND SUBSCRIPTIONS TO STOCK.—To entitle a subscriber to the stock of a corporation to exempt himself from liability upon his subscription on account of fraud of the corporation in misrepresenting or concealing facts inducing a subscription, he should, within a reasonable time after discovering the fraud, and before the rights of innocent third persons have accrued, rescind, or offer to rescind, the contract, which includes the duty to return, or offer to return, his stock to the company. (*Zang v. Adams*, 249.)

9. RESCISSION—OFFER TO RETURN PROPERTY, WHEN NOT ESSENTIAL.—One seeking a rescission of his contract of subscription to the capital stock of a corporation need not offer to return such stock, if, at the time of his discovery of the fraud on account of which he claims the right to rescind, the note which he had given for his subscription had been transferred by the corporation as collateral security, and was not in his possession, and the stock itself was of no value whatever. (*Zang v. Adams*, 249.)

10. RESCISSION, LACHES, WHEN NOT SO GREAT AS TO PREVENT EXERCISE OF RIGHT OF.—A delay of two months after the discovery of the falseness of a representation inducing a subscription to the stock of a corporation in securing a rescission, is not so unreasonable as to preclude the subscriber from rescinding his contract of subscription and defending against a promissory note given on account of the subscription, no rights of innocent holders of such note being involved. (*Zang v. Adams*, 249.)

11. CORPORATIONS, STOCK SUBSCRIPTION, RELEASE FROM FOR MISREPRESENTATIONS.—Though, at a meeting of

persons to consider the advisability of forming a corporation, statements are made respecting the business to be incorporated, and its profits, and the mode in which the property to be acquired by the corporation is to be valued, and the changes which are to occur in the mode of managing the business, a person who subscribes for stock induced by such statements cannot obtain release from his subscription by proving that some of them were false when made, and those respecting the future conduct of the corporation cannot be carried out. The persons thus attending the meeting and making statements cannot be regarded as doing so in the capacity of agents of the subsequently formed corporation, nor can it be deemed to have ratified their acts or statements because it receives the subscriptions induced thereby. (*St. Johns Mfg. Co. v. Munger*, 468.)

12. CORPORATIONS—RIGHT TO INSPECT BOOKS AND PAPERS—STATUTE.—Under a statute authorizing it, a stockholder of a corporation is entitled, at all reasonable times, and for a proper purpose, to inspect the original record, stock, and transfer books, and the record of the financial condition of the company. (*Ellsworth v. Dorwart*, 427.)

13. CORPORATIONS—RIGHT TO INSPECT BOOKS AND PAPERS—ASKING TOO MUCH.—Under a statute authorizing a stockholder of a corporation to examine certain books and papers of the company, neither an officer of the company, nor a court on mandamus proceedings, is authorized to refuse him the right to see any of the books or papers, merely because he has asked to inspect more than he is entitled to see. (*Ellsworth v. Dorwart*, 427.)

14. CORPORATIONS—RIGHT TO INSPECT BOOKS AND PAPERS—NO GROUND FOR DENIAL.—A stockholder's statutory right to examine certain books and papers of a corporation cannot be denied on the ground that the applicant is unfriendly toward the president of the company, nor because he is accompanied by his attorney and a stenographer to assist him in making the examination. (*Ellsworth v. Dorwart*, 427.)

15. CORPORATIONS, LIEN OF UPON STOCK.—At the common law a corporation had no lien upon the shares of its stockholders for debts due from them, and statutes and clauses of charters creating such a lien are in derogation of the common right, and must be strictly construed. (*Boyd v. Redd*, 792.)

16. CORPORATIONS, LIEN ON STOCK DOES NOT EXTEND TO PAPER TRANSFERRED TO THEM.—Though a statute or a charter of a corporation gives it a lien on the stock of a stockholder for what he owes it, such lien extends only to transactions between the corporation and its stockholder, and does not include obligations given by him to a third person and afterward assigned to the corporation. (*Boyd v. Redd*, 792.)

17. CORPORATIONS—FOREIGN—RIGHT OF STATE TO CONTROL.—A state has power to prevent the making of contracts within its borders by foreign corporations, or it may impose such terms as it may deem expedient, provided they do not conflict with the exclusive powers of Congress. (*Daggs v. Orient Ins. Co.*, 638.)

18. FOREIGN INSURANCE COMPANIES—SUFFICIENCY OF SERVICE OF PROCESS.—As it is competent for a state, as a condition upon which it will permit a corporation to do business within its jurisdiction, to prescribe who shall, for the purposes of serving process upon such corporation, represent it in the state, service upon such person must ordinarily be deemed sufficient. It may, therefore, be made upon a mere soliciting agent of an insurance company where the statute authorizes it. (*Gude v. Dakota Fire etc. Ins. Co.*, 860.)

19. FOREIGN INSURANCE COMPANIES—WHAT LAW GOVERNS AS TO SERVICE OF PROCESS.—If an insurance company, incorporated under the laws of this state, issues a policy of fire

insurance to parties in another state, upon fixed property in that state, the company, in an action upon the policy in that state, is subject to the laws of that state as to the service of process upon the corporation. (*Gude v. Dakota Fire etc. Ins. Co.*, 860.)

See Attachment, 3; Mandamus, 1, 2; Railroad Companies, 15.

COSTS.

See Wills, 7.

COTENANCY.

1. **COTENANCY—CONVERSION.**—An action of trover does not, as a general rule, lie in favor of one cotenant against another, for the reason that the possession of one is the possession of the other, but such action may be maintained by one cotenant against the vendee of a cotenant who has sold and delivered the entire common property without the consent of his cotenant. (*King v. Neel*, 311.)

2. **COTENANTS—ADVERSE POSSESSION BY ONE OF SEVERAL—PRESCRIPTIVE TITLE.**—If a cotenant has occupied the common property exclusively, improving it, and taking the whole rents and profits without claim or objection by the others, though they lived in the same neighborhood, his possession must be deemed adverse, and, if continued sufficiently long, creates in his favor a title by prescription to the real property. (*Fuller v. Swensberg*, 481.)

3. **ADVERSE POSSESSION—COTENANCY.**—If possession of part of a tract of land is taken under a deed of the whole, the grantee has constructive possession of the whole. This rule is applicable in favor of a cotenant who has entered under a conveyance purporting to be in severalty. (*Fuller v. Swensberg*, 481.)

4. **COTENANCY, NOTICE OF ADVERSE POSSESSION, WHAT SUFFICIENT.**—If a person enters into the possession of real property under a conveyance purporting to be of the entirety, cotenants of the grantor must regard such possession as adverse to them from the time they have actual notice thereof, or from the time when, as prudent men reasonably attentive to their own business, they ought to have known that the cotenant in possession was asserting an exclusive right to the land. (*Fuller v. Swensberg*, 481.)

5. **COTENANCY—OUSTER.—AN ENTRY UNDER A QUIT-CLAIM DEED** purporting to convey the whole premises, though the grantor owned but a moiety, followed by the exclusive possession of the property, may constitute an ouster of the cotenants of the grantor, and result in a prescriptive title in favor of the possessor. (*Fuller v. Swensberg*, 481.)

6. **COTENANCY—TAX SALES.**—When the interests of several cotenants are assessed, neither is under obligation to pay the taxes due from the other, and, therefore, either may purchase the interest of the other at a tax sale thereof and assert any title acquired from such sale. (*Bennett v. North Colo. Springs etc. Co.*, 281.)

See Partition, 2, 3.

COUNTIES.

1. **COUNTIES—LIABILITY OF FOR NEGLIGENCE OR MALICE OF AGENTS.**—A county is exempt from liability for doing a lawful act in a negligent manner, and this exemption extends to its officer or agent, although the latter shows malice in the performance of the act. (*Packard v. Voltz*, 396.)

2. **COUNTY INDEBTEDNESS, PRIORITY BETWEEN COMPULSORY AND NONCOMPULSORY.**—The liability of a county for expenditures made mandatory by the constitution and laws of the state and which must, of necessity, always continue, is para-

mount to its liability for other obligations which it might have refused to create without violating such constitution or laws. (*Rauch v. Chapman*, 52.)

3. MUNICIPAL CORPORATIONS—INDEBTEDNESS, PROVISIONS AGAINST CREATING DO NOT INCLUDE COMPULSORY OBLIGATIONS.—A constitutional provision declaring that no county, city, school district, or other municipal corporation shall become indebted in any amount exceeding a sum specified, does not apply as against obligations imposed by the constitution and laws of the state. Hence, warrants are not invalid, though issued after the county indebtedness has reached the constitutional limit, if they were issued for the services of jurors in criminal proceedings, or for expenses in serving criminal process, or for expenses of a general state election, or for any other expense, the duty of meeting which has, by the constitution and laws of the state, been imposed upon such municipality. (*Rauch v. Chapman*, 52.)

See Equity, 3-5.

COURTS.

1. PROBATE COURTS—JURISDICTION UNDER WILLS.—A probate court has no jurisdiction in distributing an estate, as against those claiming the remainder, whether the legatee under a will takes an absolute or a limited right. (*Bramel v. Cole*, 619.)

2. PROBATE COURTS—JURISDICTION TO DECLARE TRUSTS.—Probate courts have jurisdiction to order the distribution of the funds belonging to the estates of deceased persons, and for that purpose to determine who are entitled to receive them; and such orders are conclusive on all persons over whom jurisdiction has been acquired. Such courts have no jurisdiction to declare trusts in the estates distributed, or to follow up a trust fund, or to impose conditions or limitations upon its use and disposition. (*Bramell v. Cole*, 614.)

COURTS OF PROBATE.

See Courts; Executors and Administrators, 6. 7.

COVENANTS.

1. COVENANT TO PAY FOR IMPROVEMENTS DOES NOT RUN WITH THE LAND.—If a lessor of real property covenants that his lessees may erect improvements thereon, and that the lessor, his heirs, and administrators, or assigns will pay such lessee therefor at the expiration of the lease, the covenant does not run with the land, and a grantee thereof is not liable to the lessee for such improvements. The liability of the lessor upon the covenant is personal. (*Gardner v. Samuels*, 135.)

2. LIEN FOR IMPROVEMENTS MADE BY A LESSEE.—A covenant by a lessor to pay the lessee for improvements erected during the term does not, though enforceable against the lessor personally, create any lien upon the land subject to the lease and upon which the improvements were made and of which they have become a part. (*Gardner v. Samuels*, 135.)

3. COVENANTS OF WARRANTY—BREACH OF—ATTORNEY'S FEES AS DAMAGES.—Attorney's fees are a lawful element of damages to be recovered for a breach of a covenant of warranty whenever they are reasonable and necessary in defense of the title especially if the warrantor has been notified of the litigation and given an opportunity to protect his warranty. (*Meservey v. Snell*, 391.)

See Deeds, 1.

CRIMINAL LAW.

1. **CRIMINAL LAW.—GUILTY INTENTION, UNCONNECTED** with an overt act or outward manifestation, cannot be the subject of punishment under statute. (Ex parte Smith, 576.)

2. **CRIMINAL LAW—GUILT, PRESUMPTION OF FROM POSSESSION OF STOLEN PROPERTY.**—In a prosecution for stealing money an instruction that if the piece testified to have been stolen was stolen on the twenty-first day of a month and was given by the accused to a witness on the 23d of the same month, then the burden of proof shifts, and the defendant is presumed to be the thief, unless he satisfactorily explains his possession, is erroneous. (State v. McRae, 808.)

3. **CONSTITUTIONAL LAW—CRUEL AND UNUSUAL PUNISHMENT.**—A sentence of imprisonment in the penitentiary for two years for circulating and selling a newspaper devoted mainly to the publication of scandals and immoral conduct is not a cruel or unusual punishment, within the meaning of constitutional provisions prohibiting such punishment. (State v. Van Wye, 627.)

4. **CRIMINAL LAW—PUNISHMENT—EXCESSIVE SENTENCE.**—If a court has jurisdiction of the person and of the offense, the imposition of a sentence in excess of what the law permits does not render the legal or authorized portion of the sentence void, but only leaves such portion of the sentence as may be in excess open to question and attack. (In re Taylor, 843.)

5. **CRIMINAL LAW—INFORMATION CHARGING CRIMINAL USE OF UNITED STATES MAIL.**—An information charging a threat by the accused to publish the name of a debtor in a claimant agency is sufficient without alleging the connection of the accused with such agency or its character. (State v. McCabe, 589.)

6. **CRIMINAL LAW—PROHIBITED USE OF UNITED STATES MAILS.**—A person who sends letters or circulars to a debtor threatening to publish him as a bad debtor among his neighbors, and to advertise a claim against him for sale, is liable to prosecution and conviction, under a statute making it a misdemeanor for any person to deliver any letter, circular, etc., threatening to do injury to the "credit or reputation" of another. (State v. McCabe, 589.)

See Animals, 2; Statutes, 5.

CROPS.

See Fixtures.

CROSS-BILL.

See Judgment, 13-15; Mechanic's Lien, 9; Pleading, 2.

CRUELTY TO ANIMALS.

See Animals.

DAMAGES.

See Banks and Banking; Carriers, 12; Covenants, 8; Eminent Domain; Estates, 3; Municipal Corporations, 19-21; Sales, 1; Telegraph Companies, 5.

DEBTOR AND CREDITOR.

See Assignment for Benefit of Creditors; Attachment, 4, 5.

DEEDS.

1. **DEEDS—WARRANTY OF TITLE—LIABILITY FOR BREACH OF.**—If a grantor covenants to warrant and defend a title

acquired under a swamp land entry which is subsequently illegally canceled and set aside, and such illegality is successfully shown by the grantee of the entry man, in an action against him attacking his title, the failure of such grantor to appear in such action and defend the title when notified and requested to do so, is a breach of his warranty, rendering him liable to the grantee for reasonable attorney's fees and expense incurred in defense of the title. (*Meservy v. Snell*, 301.)

2. DEED, DELIVERY WITHOUT KNOWLEDGE OF GRANTEE.—When one delivers a deed to a third person in the absence of the grantee, the latter is presumed to accept it, so that it forthwith becomes a deed. This presumption can be rebutted by proving that the grantee refused to accept it. (*Robbins v. Rascoe*, 774.)

3. DEED, DELIVERY OF, WHEN COMPLETE AND IRREVOCABLE.—A grantor who signs and seals a conveyance and delivers it to a third person with instructions to have it proved by the subscribing witnesses, before the proper officer, and then to record it, has thereby made a complete and irrevocable delivery, and the instrument remains in force, though, before the grantee knew of its existence, the grantor obtained possession of it, saying that he had changed his mind, and after his death it was destroyed by his executor. (*Robbins v. Rascoe*, 774.)

4. DEEDS—ESCROW—FRAUDULENT DELIVERY.—If a deed placed in escrow is fraudulently abstracted from the possession of the depository without performance of the conditions attached to its delivery, it is void in the hands of a bona fide purchaser in the absence of the negligence of the grantor being pleaded and relied upon as an estoppel. (*Jackson v. Lynn*, 386.)

5. DEEDS—ESCROW—FRAUDULENT DELIVERY—CANCELLATION.—If two persons agree to exchange lands, and one grantor delivers a deed to his property to the other grantor who places the deed executed by him to his property in escrow with certain conditions attached to its delivery, and, under the contract of exchange, the property of the first-named grantor is to be forfeited if such conditions are not complied with, and such grantor, without complying with the conditions, fraudulently takes the deed in escrow from the possession of the depository, the second-named grantor may maintain an action to cancel the deed taken out of escrow, without tendering back the land received in exchange. (*Jackson v. Lynn*, 386.)

6. DEEDS—ESCROW—FRAUDULENT DELIVERY—RATIFICATION.—If two persons agree to exchange lands, and one grantor delivers a deed to his property to the other grantor, who places the deed executed by him to his property in escrow with certain conditions attached to its delivery, and the first-named grantor, without performing such conditions, fraudulently takes the deed out of escrow and records it, the fact that the second grantor subsequently records the deed to the land received in the exchange, and enters into its possession, does not constitute a ratification of the deed taken out of escrow, if under the contract of exchange and the deed received by him he is entitled to the immediate possession of the property exchanged. (*Jackson v. Lynn*, 386.)

7. REGISTRATION OF DEEDS, TO WHOM GIVES NOTICE.—The only purchasers charged with notice by the registration of an instrument affecting the title to real property are those who purchase after the filing for such registration. This remains true though the prior purchaser has not acquired the legal title nor made full payment of the purchase price. (*Corey v. Smalley*, 474.)

8. DEEDS.—PAROL EVIDENCE TO EXPLAIN A DEED is not admissible where, without such evidence, its meaning is clear. Hence, the effect of a conveyance of the west half of a lot of land

cannot be modified by evidence of the understanding of the parties as shown by prior conveyances and by their testimony at the trial. (*Owen v. Henderson*, 17.)

9. A CONVEYANCE OF THE WEST HALF OF A LOT IN. **CLUDES** the west half in quantity and not merely the part lying westerly of a line drawn north and south midway between, and parallel to, the side lines of the lot. (*Owen v. Henderson*, 17.)

See Cotenancy, 5; Husband and Wife, 8; Insane Persons, 1, 2.

DEFINITIONS.

"Abuse of process." (*Nix v. Goodhill*, 434.)

"Baggage" (*Kansas City etc. Ry. Co. v. McGahey*, 111.)

"Negligence." (*Brotherton v. Manhattan Beach Imp. Co.*, 709.)

DOWER.

See Marriage and Divorce, 1, 2.

EJECTMENT.

1. **EJECTMENT, DEFECTS IN DEFENDANTS' TITLE.**—A plaintiff suing to recover real property must show title in himself, and, failing to do so, is not aided by defects in the defendants' title. (*Wilson v. Leary*, 778.)

2. **EJECTMENT FOR A MINING CLAIM—POSSESSION OF THE DEFENDANT, WHEN NEED NOT BE PROVED.**—If the defendants do not disclaim, but interpose some other defense in an action for the possession of a mining claim or to recover for trespass thereon, it is not necessary to prove that they have been in possession of any part of the property in dispute. (*Argonaut Con. Mining etc. Co. v. Turner*, 245.)

3. **EJECTMENT, STATUTE GIVING A RIGHT TO NEW TRIAL ON PAYMENT OF COSTS.**—Under a statute declaring that whenever judgment shall be rendered against either party to an action of ejectment, it shall be lawful for him, before the first day of the next term, to pay the costs recovered by his adversary and to have the judgment vacated, but that neither party shall have more than one new trial as of right, if the defendant recovers judgment and the plaintiff pays the cost and procures a new trial, and thereon recovers judgment in his favor, the defendant is then entitled, on payment of the costs of the last judgment, to have a new trial. In other words, each of the parties, if unsuccessful, has a right to a new trial on the payment of costs. (*Schwed v. Hartwitz*, 221.)

See Insane Persons, 2; Mines and Mining, 3.

ELECTIONS.

1. **ELECTIONS—OMISSION OR MISCONDUCT OF REGISTERING OFFICERS.**—A qualified elector cannot be deprived of his right to vote by the willful or negligent acts of the registrar. Hence, it is no ground for rejecting the vote of an elector, whose name appears on the registration books, that he was not sworn by such officer, as by law required, before entering his name on such books. (*Quinn v. Lattimore*, 797.)

2. **ELECTIONS, REGISTRATION BY UNAUTHORIZED PERSONS.**—Electors whose names appear on the registration books cannot be deprived of their right to vote on the ground that the persons registering them were not regularly appointed, the acts of such persons having been recognized and ratified by the election officers. (*Quinn v. Lattimore*, 797.)

3. **ELECTIONS.—IF A PERSON VOTES IN BAD FAITH,** and not through any mistake, in a township different from that in which

he lives, his ballot should be rejected in an election contest. (*Quinn v. Lattimore*, 797.)

4. ELECTIONS—VOTES CAST IN A TOWNSHIP IN WHICH THE VOTER DID NOT RESIDE.—Electors who live on or near the dividing line between two townships cannot be regarded as acting in bad faith in voting in the township in which they had been registered for many years, and where they had been in the habit of voting, paying their taxes, and sending their children to school, though they knew that their residence was not in such township, it appearing that all were entitled to vote somewhere in the county, and that no person was prejudiced by their casting their votes in one township rather than in the other. (*Quinn v. Lattimore*, 797.)

5. ELECTIONS—AUSTRALIAN BALLOT LAW—RULE AS TO DISTINGUISHING MARKS.—A mark on a ballot, which satisfactorily appears to have been inadvertently or accidentally made, and not for an evil purpose, is not within the meaning of a statute requiring the exclusion, from the count, of all ballots having thereon marks not authorized by law, and should not be construed as an identifying or distinguishing mark. (*Dennis v. Caughlin*, 761.)

6. ELECTIONS—AUSTRALIAN BALLOT LAW—WHAT MARKS WILL NOT AVOID A BALLOT.—The fact that a ballot was written by a hand unaccustomed to the use of a pencil, or that there was awkwardness in the use of a pencil, or carelessness in the preparation of the ballot, or an apparent attempt to retrace a clumsily made cross, or X, or an effort to make it more certain, and, in doing so, employing more lines than are necessary to make a cross properly, or a slightly blurred spot to correct a mistake, not indicating an intention to identify the ballot, or a slight erasure for the same purpose, or a cross made when the ballot paper was defective, and, to avoid the defect, and to make the vote more certain, a second cross was made, or a slight pencil mark, clearly made by accident, and not design, or a stain of tobacco, will not avoid the ballot. (*Dennis v. Caughlin*, 761.)

7. ELECTIONS—AUSTRALIAN BALLOT LAW—WHAT MARKS WILL AVOID A BALLOT.—A ballot having blurred spots, plainly made by a lead pencil, which may have been made for the purpose of canceling a cross, but which might have been made also for identification, or a cross not opposite the name of any candidate, or two or more crosses instead of one, or a number of crosses in a bunch, or a mark not a cross, or blue lead pencil marks instead of black ones, or a straight line, thus,—over the word, "No," or a word written where there should be a cross, must be rejected. (*Dennis v. Caughlin*, 761.)

8. ELECTIONS, INFORMALITIES IN NOTICE.—Formalities in giving notice prescribed by statute are regarded as directory merely, unless there is a declaration that the failure to observe a particular formality shall render the election void. An election will, therefore, not be declared invalid for the omission of some formality in the notice, if it appears that the time and place of holding the election and the questions to be submitted had become matters of general notoriety, and that the great body of electors participated in the election. (*State v. Doherty*, 39.)

9. ELECTIONS.—A NOTICE OF AN ELECTION AT WHICH AMENDMENTS TO A MUNICIPAL CHARTER are to be voted upon sufficiently specifies the object of the election when it refers to an ordinance containing the proposed amendments, though it does not otherwise disclose their contents. (*State v. Doherty*, 39.)

10. ELECTIONS, MANNER OF GIVING NOTICE.—A state constitution requiring that certain elections shall be had only upon notice specifying the object of the election given in all the election districts of the city for ten days before it is held does not prescribe

the method of giving such notice, and therefore an election cannot be held invalid on the ground that the notices were not posted in each election precinct, if notice was otherwise given in such a manner that the great body of electors had actual notice of the time and place of holding the election and of all questions submitted. (*State v. Doherty*, 39.)

11. ELECTIONS, FAILURE TO POST PROPER NOTICE.—Though an ordinance directs the posting at polling places within the city of a certified copy of the notice of election and of every one of the proposed amendments to the city charter to be voted upon, the failure of the clerk to post such certified copy will not invalidate the election, if newspaper clippings containing correct copies were posted in all of the polling places, and the notice of election was also published in the newspapers circulating throughout the city, and the amendments to be voted upon were matters of public notoriety. (*State v. Doherty*, 39.)

12. ELECTION CONTESTS—BALLOTS, REFUSAL TO RE-COUNT OR REOPEN, WHEN NOT ERRONEOUS.—In an election contest, the court may refuse to permit ballot-boxes to be opened and the ballots recounted for the purpose of being examined as to frauds alleged, unless some testimony is first offered tending to show such frauds. (*Kindel v. Le Bert*, 234.)

13. ELECTIONS—OBJECTIONS TO VOTERS, WAIVER OF.—If a vote is received and deposited by the judges of an election, it is presumed to be legal, although the voter may not have complied with all the requirements of the registration law, provided he is otherwise qualified to vote. Hence, if an elector has done all the acts entitling him to be registered, and supposes that his registration is perfect, but, through neglect of the register, his name does not appear on the books, but he is, nevertheless, allowed to vote, his vote should not be excluded in a subsequent election contest. (*Quinn v. Lattimore*, 797.)

14. ELECTION CONTESTS—EVIDENCE TO CONTRADICT RETURNS.—The result of a count of votes made by officers of an election and declared by them cannot be overcome by the production of a tally sheet showing a different result, if such sheet has been kept in a public place to which all persons had access, and there is nothing to show that it has not been tampered with. A finding based upon such sheet only is not supported by sufficient evidence. (*Quinn v. Lattimore*, 797.)

15. ELECTION CONTESTS—PLEADINGS.—The general statement in an election contest that the defendant tampered with, or altered, the returns after they were received by him, though not denied, is too vague and general to support a motion for a judgment upon the pleadings. The mere statement that one is guilty of a fraud is not sufficient to call for denial. Besides, this statement is deficient in not alleging that the tampering with returns prejudiced the contestant or changed the result of the election. (*Kindel v. Le Bert*, 234.)

16. ELECTION CONTESTS—AMENDMENTS.—Where the proceeding in an election contest is governed by a special statute, which does not provide for amendments, and in which the proceedings are not assimilated to some practice so providing, amendments of the contestant's pleadings cannot be permitted to set up a ground of contest not stated in the original pleadings. (*Kindel v. Le Bert*, 234.)

17. CONSTITUTIONAL LAW—PENALTY FOR NOT VOTING.—A provision in a city charter imposing a poll tax on every male resident of legal age, except such as vote at a general city election, is unconstitutional and void as imposing a penalty on voters for not voting at such election. (*Kansas City v. Whipple*, 657.)

EMINENT DOMAIN.

EMINENT DOMAIN—DAMAGES—WAIVER OF.—If land is purchased, when it might have been condemned, the consideration is conclusively presumed to cover all damages to the remainder of the tract for which the owner could have obtained compensation in condemnation proceedings. (*Nunnamaker v. Columbia Water etc. Co.*, 905.)

EQUITY.

1. EQUITY—JURISDICTION—DISPUTED BOUNDARIES.—Equity has jurisdiction of a question of disputed boundary where the boundary has become confused through the fraud of the defendant, or where the duty of preserving it rests upon him, or where the exercise of jurisdiction will avoid a multiplicity of suits. (*Humboldt Co. v. Lander Co.*, 750.)

2. EQUITY—JURY TRIAL—SUBMISSION OF ISSUES IN EQUITY CASES.—Special issues only should be submitted to a jury which has been called to assist in the trial of an equity case. Therefore, a judgment based upon a general verdict in such an action is erroneous. (*Hulley v. Chedle*, 729.)

3. EQUITY—JURISDICTION—DISPUTED BOUNDARIES—COUNTIES.—A court of equity does not have jurisdiction of a question of boundary simply because it is in dispute. In addition to this, there must be shown some equitable circumstance which has arisen from the conduct, situation, or relations of the parties, and this principle applies to disputed county boundaries. (*Humboldt Co. v. Lander Co.*, 750.)

4. EQUITY—JURISDICTION—DISPUTED BOUNDARIES—COUNTIES.—In a dispute between two counties as to the boundary line between them, the mere fact, in addition to the one of dispute, that one of the counties is claiming jurisdiction over the disputed tract, is collecting taxes upon property situated therein, and is claiming the right to continue to do so, does not confer equity jurisdiction in the matter. (*Humboldt Co. v. Lander Co.*, 750.)

5. JUDGMENT—DECREE—EFFECT OF, AS TO THOSE NOT PARTIES.—A decree in equity as to the situation of a disputed county boundary line does not determine that question as to anyone not a party to the action. (*Humboldt Co. v. Lander Co.*, 750.)

6. EQUITY—JURISDICTION TO ENJOIN PROCEEDINGS IN ANOTHER STATE AND TO DIRECT CONVEYANCE OF LAND THEREIN.—If a debtor, after making a deed to his wife, of land in another state which is fraudulent as to his creditors, makes an assignment for the benefit of the latter under the insolvency laws of the state of his domicile, and a creditor, who is a party to the insolvency proceedings, proves his entire debt therein, and then prevails upon the assignee in insolvency to commence an action as such, against the debtor and his wife, in the courts of such other state, to recover, as part of the trust estate, the land thus conveyed, after which such creditor also commences an action there against the same parties to subject the same land to the payment of his debt, a court of equity in the state of the domicile of the debtor has jurisdiction to direct the wife of the debtor to convey such land to the assignee, and to enjoin such creditor from further prosecuting his suit in the other state, especially when all of the parties to the proceeding in equity, as well as all of the creditors of the debtor, are residents of the state of his domicile. (*Hawkins v. Ireland*, 534.)

See Injunctions, 1; Insane Persons, 2; Judgment, 19.

ESCROW.

See Deeds, 4-6.

ESTATES.

1. ESTATE—LEASEHOLD—TAKING FOR PUBLIC USE.—A leasehold interest in premises for a definite term is property within the meaning of a constitutional provision prohibiting the taking or damaging of private property for public purposes without just and adequate compensation being first paid. (*Pause v. City of Atlanta*, 200.)

2. ESTATES—LEASEHOLD—DAMAGES FROM PUBLIC IMPROVEMENT.—A holder of a leasehold has such an interest in the premises as enables him to maintain an action for damages resulting to his estate, in consequence of the construction of a duly authorized public improvement, whether such damage results from the negligence of the public authorities, or otherwise. (*Pause v. City of Atlanta*, 200.)

3. MORTGAGES—FORECLOSURE—RIGHTS OF LIFE TENANT AND REMAINDERMAN.—If a life tenant purchases the estate at mortgage foreclosure sale, the purchase is regarded as having been made for the benefit of the remainderman as well as himself, provided the remainderman pays his proportion of the purchase price within a reasonable time; but, if the latter is guilty of laches in this respect, the right must be denied him after a lapse of years and after the property has been improved and greatly increased in value. (*Cockrill v. Hutchinson*, 564.)

4. LIFE ESTATES—RIGHT TO INCOME.—One holding a life estate is not entitled to the income therefrom if a different intention clearly appears from the will or other instrument creating such estate. (*Bramel v. Cole*, 619.)

5. WILLS—CONSTRUCTION—LIFE ESTATE—POWER OF DISPOSITION.—If a will devising a life estate to a devisee directs that he shall have "full control" of property during life, and that "what is left" is to go to named remaindermen, the life tenant has no power to dispose of the estate, as the word "control" simply implies a power to invest and reinvest, but does not imply a power to dispose of the estate itself so as to defeat the rights of those entitled to its future use. It implies such powers as are usually conferred upon trustees of express trusts. (*Bramel v. Cole*, 619.)

6. WILLS—CONSTRUCTION—LIFE ESTATE—POWER OF DISPOSITION.—If a life estate is expressly given by will, a power of absolute disposition is not to be implied from the fact that the devise or bequest over is of what remains at the death of the first taker, when it also appears that the property may be diminished in the hands of the life tenant by the uses to which it may properly be applied. (*Bramel v. Cole*, 619.)

See Marriage and Divorce, 1, 2; Mechanics' Lien, 2; Municipal Corporations, 19, 20.

ESTOPPEL.

ESTOPPELS IN PAIS MUST BE SPECIALLY PLEADED to be available as a defense. (*Cockrill v. Hutchinson*, 564.)

See Carriers, 13; Deeds, 4; Husband and Wife, 8; Mortgage, 9.

EVIDENCE.

1. JUDICIAL NOTICE.—The court will take judicial notice that the Truckee river has its source in Lake Tahoe, a large navigable body of water, lying partly in this state, that it flows thence into the state of Nevada, and empties into Pyramid lake, also navigable, and that between these two bodies of water the river affords a natural and free highway for the passage of fish. (*People v. Truckee Lumber Co.*, 183.)

2. EVIDENCE—WAIVER OF OBJECTIONS.—If a certificate of an abstract company is offered in evidence for the purpose of showing the assessment of property and the payment of taxes thereon, and the opposing counsel thereupon say that they do not object "because the tax deeds themselves are not introduced, but for other reasons," this is a waiver of their right to subsequently complain because better evidence was not introduced. (*Bennett v. North Colo. Springs etc. Co.*, 281.)

3. LAWS—FOREIGN—PROOF OF.—Foreign laws must be proved, and, if they are written, the laws themselves, or authenticated copies, must be produced, but, if they are not written, they may be proved by the evidence of witnesses who are competent to testify on the question. (*Robertson v. Staed*, 569.)

4. EVIDENCE—DECLARATIONS—RES GESTAE.—Statements of a man who has been shot, made to a woman and child, as to who shot him, as soon as they could reach him, and within five minutes after the shooting are admissible as part of the *res gestae*. (*State v. Arnold*, 867.)

5. EVIDENCE—DECLARATIONS—RES GESTAE.—To make declarations part of the *res gestae*, they must be contemporaneous with the main fact, but they need not be precisely concurrent in point of time. If they spring out of the transaction, elucidate it, and are made at a time so near to it as reasonably to preclude the idea of deliberate design, then they are to be regarded as contemporaneous. (*State v. Arnold*, 867.)

See Appeals, 4; Carriers, 11; Deeds, 8; Elections, 14; Insurance, 24; Judgment, 7; Mortgages, 3; Negotiable Instruments, 7; Railroad Companies, 13; Wills, 5, 6, 9-14.

EXECUTION.

1. EXECUTION — EXEMPTION — "ABSTRACT BOOKS."—The books of an abstracter of titles, and other property used in connection therewith, are not exempt from execution, under a statute allowing an exemption to a "farmer, mechanic, surveyor, clergyman, lawyer, physician, teacher, or professor," as he does not come within any class of the persons named. (*Tyler v. Coulthard*, 452.)

2. EXEMPT EARNINGS—GIFT OF.—Under a statute exempting from execution the earnings of a debtor for his personal services, or those of his family, at any time within ninety days preceding the levy of a writ, he may within such time make a gift of such earnings to his wife, and his creditors cannot complain, because they are not thereby defrauded. (*Carse v. Reticker*, 421.)

3. EXECUTION SALES. PURCHASERS AT ARE PROTECTED FROM SECRET EQUITIES.—One who purchases at an execution sale and pays the purchase price is from that moment entitled to be regarded as an innocent purchaser, though the judgment debtor retains the right to redeem during a period specified by the statute. Such purchaser is not affected by equities of which he had no notice at the payment of his bid, though notice thereof was brought home to him before he became entitled to a deed. (*Duff v. Randall*, 158.)

See Attachment, 6.

EXECUTORS AND ADMINISTRATORS.

1. EXECUTORS AND ADMINISTRATORS—LAND—PAYMENT OF DEBTS.—Creditors and administrators must apply for the subjection of land to the payment of debts within a reasonable time, and if, without sufficient cause, they fail to do so, their rights in that respect will be barred. (*Brogan v. Brogan*, 124.)

2. EXECUTORS AND ADMINISTRATORS—LAND—PAYMENT OF DEBTS—LACHES—ALLOWING TIME FOR APPEAL TO EX-

FIRE.—If the land of an intestate is in litigation, it is not an unreasonable delay for the administrator to wait, after a final judgment in the trial court, until the time allowed for an appeal has expired before attempting to subject the land to the payment of debts. (Brogan v. Brogan, 124.)

3. EXECUTORS AND ADMINISTRATORS—LAND—PAYMENT OF DEBTS—LACHES.—A delay for more than seven years after the grant of letters of administration before attempting to subject the land of an intestate to the payment of his debts is not reasonable, and, therefore, defeats the rights of a creditor, or an administrator in his behalf, unless there is something to excuse the delay. That the title has been involved in litigation is no excuse where more than seven years have elapsed since the removal of that impediment. (Brogan v. Brogan, 124.)

4. EXECUTORS AND ADMINISTRATORS—LAND—PAYMENT OF DEBTS—LACHES.—A delay for more than seven years after the grant of letters of administration before attempting to subject the land of an intestate to the payment of his debts will bar such a proceeding, where the only excuse for the delay is that the values of real estate in the city where the land was situated were declining during that time. (Brogan v. Brogan, 124.)

5. EXECUTORS AND ADMINISTRATORS—LAND PAYMENT OF DEBTS—CONSENT TO DELAY.—Although the administrator of an estate is one of its heirs, and consents, with a number of the creditors, to delay the sale of its land, because of a depression in the value of real estate, this does not, as to the nonconsenting heirs, excuse the creditors and administrator from taking steps to have the land sold for the payment of debts. Hence, a delay of over seven years will bar the right to subject the land to the payment of debts, except as to the interest of the administrator. He cannot take advantage of his own laches, and, being one of the heirs, his interest in the land is still subject to the debts of the estate. (Brogan v. Brogan, 124.)

6. COURTS OF PROBATE—POWERS—DETERMINING RIGHTS OF CREDITORS.—In deciding whether an administration shall be closed, a probate court has power, incidentally, to determine whether or not the creditors of a decedent's estate have, by laches, lost the power to subject the real estate of the intestate to the payment of their debts. (Brogan v. Brogan, 124.)

7. COURTS OF PROBATE—POWERS—FINAL SETTLEMENTS OF ADMINISTRATORS.—A probate court has power to determine when an administrator shall make a final settlement, and it is the duty of that court to require an administrator to make a final settlement when the assets of the estate have been fully administered. (Brogan v. Brogan, 124.)

8. JUDGMENTS AGAINST ADMINISTRATORS establishing debts against their estates are, in the absence of fraud, equally conclusive upon the administrators and the heirs, both as to the personality and realty belonging to their estates. (Moody v. Peyton, 604.)

EXEMPTIONS.

See Execution.

EXPRESS COMPANIES.

See Carriers, 7.

FISHERIES.

1. FISHING, LICENSE FOR, INTERPRETATION OF.—A license to fish granted by the fish commissioners of the state of Washington pursuant to the statutes of such state constitutes what

is termed a "roving" license only, and does not entitle the licensee to construct or maintain a fishtrap or pound net by the operation of which other fishermen must be prevented from pursuing their business. (Morris v. Graham, 33.)

2. NUISANCE, PUBLIC, SPECIAL DAMAGE ENTITLING PLAINTIFF TO ENJOIN.—Persons engaged in the exercise of their common right of fishing in the waters of a navigable stream suffer from the construction and maintenance of a fishtrap or pound net in the channel of such stream a damage and special injury in which the general public do not share, and may, therefore, maintain a suit to enjoin the continuance of such injury. (Morris v. Graham, 33.)

3. NAVIGABLE WATERS, RIGHT OF PRIVATE PERSONS TO ENJOIN PUBLIC NUISANCE IN.—One engaged in the business of fishing in the navigable waters of the state may maintain an action in behalf of himself and all others similarly situated to enjoin the erection of a fishtrap or pound net in the channel of a navigable stream, if such erection will render it impossible for the plaintiff and others in whose behalf the suit is brought to pursue the common right of fishing in waters in that vicinity. (Morris v. Graham, 33.)

4. FISH, RIPARIAN PROPRIETOR'S RIGHTS RESPECTING. Though a stream is not navigable, and the lands through which it flows have vested in private ownership, the riparian proprietors do not own the fish therein. Their right of property attaches only to those reduced to actual possession, and they have no right to kill or obstruct the free passage of those not taken. (People v. Truckee Lumber Co., 183.)

5. FISH IN NON-NAVIGABLE WATERS.—THE RIGHT OF A STATE TO PROTECT FISH is not confined to navigable or public waters. It extends to all waters within the state, public or private, where these animals are accustomed to resort for spawning or other purposes, and of which they have freedom of passage to and from the public fishing grounds of the state. (People v. Truckee Lumber Co., 183.)

6. FISH WITHIN THE WATERS OF A STATE constitute the most important part of that species of property commonly designated as "wild game," and the original right and ownership of which is in the people of the state. The right to protect such property for the common use and benefit is one of the recognized prerogatives of the sovereign. (People v. Truckee Lumber Co., 183.)

See Nuisance, 1, 3.

FIXTURES.

FIXTURES—FENCES AND GROWING CROPS.—Fences permanently affixed to land, and unmatured crops growing upon land belonging to the owner of such crops, constitute a part of the realty. (Bagley v. Columbus Southern Ry. Co., 325.)

FOREIGN COURTS.

See Jurisdiction.

FOREIGN LAWS.

See Evidence, 3.

FRAUD.

FRAUD—PROOF OF—CIRCUMSTANCES OF SUSPICION. Fraud is never presumed, but must be proved, and the burden of proving it is upon the party alleging it. Direct or positive evidence

is not necessary, but it may be proved by circumstances which naturally, logically, and clearly indicate its existence. Circumstances of mere suspicion, leading to no certain result, are not sufficient to prove it. (*Bank of Little Rock v. Frank*, 65.)

See Assignment for Benefit of Creditors, 2-4; Corporations, 5-11; Judgment, 24.

FRAUDULENT CONVEYANCES.

1. FRAUDULENT CONVEYANCES TO DEFEAT CREDITORS. An assignment made and accepted for the purpose of hindering, delaying, or defrauding creditors is, as to those creditors, void. (*Hulley v. Chedick*, 729.)

2. FRAUDULENT CONVEYANCES—DEFAUDING CREDITORS—RIGHT OF ACTION AGAINST FRAUDULENT TRANSFEREE.—A judgment creditor, whose execution has been returned unsatisfied, has an equitable right of action to recover a money judgment against one to whom the debtor has transferred property for the purpose of hindering, delaying, or defrauding his creditors, and who has subsequently converted it into money. The fact that such an action is brought in pursuance of an order obtained in a proceeding supplemental to execution does not make it an action at law. (*Hulley v. Chedick*, 729.)

GAME LAWS.

1. GAME LAWS.—THE STATE, IN THE EXERCISE OF ITS POLICE POWER, may impose such limitations and restrictions upon the right of property in game, after it is taken or killed, as tends to prevent its extermination or undue depletion. (*State v. Chapel*, 524.)

2. CONSTITUTIONAL LAW—GAME LAWS.—A statute making it "unlawful for any person to consign by common carrier to any commission merchant or sale market, at any time, any elk, moose, caribou, or deer, or any part thereof, except the skin or head," is not unconstitutional as depriving citizens of their privileges and property without due process of law. (*State v. Chapel*, 524.)

GARNISHMENT.

See Attachment.

GIFTS.

GIFT OF NOTE CAUSA MORTIS, VALIDITY OF.—If a note is regularly indorsed and delivered by the payee as a gift causa mortis, the gift is not void, though the donor recovers from his illness, but simply voidable by the donor only, or his lawful representative. The indorsee, therefore, has the right to enforce payment, which cannot be resisted, either by the maker or his creditors, upon the ground that the indorsement was made causa mortis, and that the gift had been subsequently revoked by the recovery of the donor. (*Hulley v. Chedick*, 729.)

GUARDIAN AND WARD.

1. GUARDIAN AND WARD—GUARDIAN'S BOND—VALIDITY.—The fact that a guardian's bond is given for the benefit of more than one minor does not vitiate it. (*Deegan v. Deegan*, 742.)

2. GUARDIAN AND WARD—SUFFICIENCY OF GUARDIAN'S BOND.—The law regards not the form but the substance of a guardian's bond, and it will, therefore, be held sufficient to bind the obligors although it may be inartificially drawn or slightly defective. (*Deegan v. Deegan*, 742.)

3. GUARDIAN AND WARD—BREACH OF BOND—LIABILITY OF SURETIES.—If a guardian converts the funds of his ward to his own use, there is a breach of his duty as guardian, and, therefore, a breach of his bond, for which the sureties are answerable, where such bond is conditioned for the faithful performance of the guardian's trust. (*Deegan v. Deegan*, 742.)

4. GUARDIAN AND WARD—ACTION ON GUARDIAN'S BOND—DEFENSES.—If a guardian of several minors gives but one bond, and an action is brought thereon, the sureties cannot escape liability on the ground that the action is brought by only one of the obligees, or on the ground that the bond fails to comply with the law by reason of its being joint instead of several as to the obligees. (*Deegan v. Deegan*, 742.)

5. GUARDIAN AND WARD—CONCLUSIVENESS OF JUDGMENT.—The judgment of a court having original jurisdiction in matters of guardianship is, until reversed, modified, or impeached, conclusive, not only against the guardian himself, but also against the sureties upon his official bond. Whatever binds and concludes the guardian equally binds and concludes his sureties. (*Deegan v. Deegan*, 742.)

6. GUARDIAN AND WARD—COLLATERAL ATTACK IN GUARDIANSHIP MATTER.—An objection, in an action upon a guardian's bond, to orders revoking the letters of the former guardian, and appointing another in his stead, is a collateral attack upon the judgment of the court in the guardianship matter. (*Deegan v. Deegan*, 742.)

7. GUARDIAN AND WARD—COLLATERAL ATTACK—PRESUMPTION OF JURISDICTION.—If the judgment of a court having original jurisdiction of a guardianship matter is collaterally attacked, the jurisdiction of that court is conclusively presumed, and evidence to the contrary is not admissible. (*Deegan v. Deegan*, 742.)

8. GUARDIAN AND WARD—JUDGMENT—COLLATERAL ATTACK.—The judgment of a court having original jurisdiction in all cases relating to the persons and estates of minors cannot be successfully resisted until reversed or modified by some proceeding impeaching it. (*Deegan v. Deegan*, 742.)

9. GUARDIAN AND WARD—FAILURE TO ACCOUNT—REMOVAL OF GUARDIAN.—If a guardian fails to account after having been cited by the court to do so, he may be removed, under the statutes of Nevada, for such failure, without further notice. (*Deegan v. Deegan*, 742.)

10. GUARDIAN AND WARD—AUTHORITY OF ATTORNEY TO APPEAR—PRESUMPTION.—In a collateral attack upon a judgment removing a guardian, the authority of an attorney to appear for him is presumed, and the contrary cannot be shown. (*Deegan v. Deegan*, 742.)

HABEAS CORPUS.

1. HABEAS CORPUS TO TEST CONSTITUTIONALITY OF LAWS.—The supreme court of a state may interfere by means of the writ of habeas corpus, to investigate the constitutionality of a statute or ordinance on which a judgment resulting in the imprisonment of a petitioner is founded; and, if such law is found to be invalid and unconstitutional, the petitioner is entitled to be discharged. (*Ex parte Smith*, 576.)

2. HABEAS CORPUS—EXCESSIVE SENTENCE—VALIDITY OF.—If a sentence includes that which a court has a right to include, and something more, the excess only is void when such excess is separable, and may be dealt with without disturbing the valid portion of the sentence; and habeas corpus cannot be invoked until the time has expired to which the judgment should have been limit-

ed. Hence, if one is sentenced, by mistake, to five years' imprisonment, where a sentence of two years only can be imposed, the sentence is valid as to the two years but void as to the three years, and the prisoner is not entitled to discharge on habeas corpus until after the expiration of two years. (*In re Taylor*, 843.)

HOMESTEAD.

1. HOMESTEAD.—A JUDGMENT TO WHICH A WIFE IS NOT A PARTY foreclosing a mortgage upon the homestead, though her rights accrued after the execution of the mortgage, is void as against her, and a purchaser at the sale thereunder acquires no title whatever. (*Brackett v. Banegas*, 164.)

2. A HOMESTEAD RIGHT DOES NOT CEASE UPON THE DEATH OF EITHER SPOUSE.—The homestead right of a husband or wife upon community property does not cease upon the death of either of them. Hence, if the wife files a declaration of homestead upon community property, on which they are both residing, and where they continue to live until the wife's death, the homestead remains a homestead in his hands, and is exempt from levy and sale for his debts, while he continues to reside upon it, although he has no children or other dependent relatives living with him. (*Roberts v. Greer*, 755.)

3. HOMESTEADS—VOID MORTGAGE OF—RATIFICATION. Although a mortgage upon a homestead is signed and acknowledged by both husband and wife, the failure of the husband to join in the granting part thereof renders it void, under a statute requiring "the husband and wife to concur in and sign the same joint instrument" conveying or encumbering the homestead, and such mortgage is not ratified nor rendered valid as between the parties to it, by a recital in a second mortgage of the same property, duly executed, that it is "subject" to such first and void mortgage. (*Seiffert etc. Lumber Co. v. Hartwell*, 413.)

See Acknowledgment, 1; Insurance, 19, 20; Judgment, 20; Notice, 2; Partnership, 3.

HUSBAND AND WIFE.

1. HUSBAND AND WIFE—COMMUNITY PROPERTY, NATURE OF HUSBAND'S INTEREST IN.—Under a statute providing that a husband has the management and control of the community property, with the like power of disposition, other than testamentary, as he has of his separate estate, he is the owner of such property, and the interest of his wife therein is a mere expectancy. (*Spreckels v. Spreckels*, 170.)

2. HUSBAND AND WIFE—COMMUNITY PROPERTY, STATUTE ATTEMPTING TO DEPRIVE HUSBAND OF POWER TO MAKE GIFTS.—If community property is acquired under a statute giving the husband the same power over it, other than testamentary, as of his separate estate, an amendment of such statute providing that he cannot make a gift of such property or convey it without consideration unless his wife in writing consents thereto, cannot be applied to community property acquired prior to its enactment. (*Spreckels v. Spreckels*, 170.)

3. HUSBAND AND WIFE—DUTIES OF WIFE.—It is the duty of a wife, without compensation, to attend to all her ordinary household duties, and to labor faithfully to advance her husband's interests, but she is under no duty to undertake the boarding of large numbers of people, none of whom are members of his family. (*Carse v. Reticker*, 421.)

4. HUSBAND AND WIFE—HIS RIGHT TO CONTRACT WITH HER AND GIVE HER THE PROCEEDS.—A husband who is the sheriff of a county and has the right to contract for the boarding of prisoners, may contract therefor with his wife, stipulating that she shall have all the profits of the contract, and his creditors cannot recover of her such profits or property in which they have been invested, especially if such creditors knew of such contract, assented to it when made, and encouraged and advised the wife to enter upon its performance. (*Carse v. Reticker*, 421.)

5. HUSBAND AND WIFE, HIS AGREEMENT TO PAY FOR HER SERVICES.—An agreement by a husband to pay his wife a designated sum for her services as housekeeper is contrary to public policy and void. (*Michigan Trust Co. v. Chapin*, 490.)

6. HUSBAND AND WIFE—SEPARATE ESTATE—MORTGAGE.—Recitals in a mortgage and the acknowledgment thereto executed by a married woman jointly with her husband, that the land mortgaged is her separate estate, does not make it such estate. (*Cockrill v. Hutchinson*, 564.)

7. HUSBAND AND WIFE.—A MORTGAGE EXECUTED BY A MARRIED WOMAN jointly with her husband on land not her separate estate is valid and binding, although her note, the payment of which is secured by the mortgage, is void by reason of her coverture. (*Cockrill v. Hutchinson*, 564.)

8. HUSBAND AND WIFE—MARRIED WOMAN'S DEED.—Recitals in a deed executed by a married woman do not create an estoppel against her or those claiming under her. (*Cockrill v. Hutchinson*, 564.)

9. PARTNERSHIP—HUSBAND AND WIFE.—A married woman may engage in business with her husband as a copartner, provided such partnership is bona fide and actual, and not merely colorable. It cannot be used as a mere device for rendering the wife liable for, or subjecting her property to, the payment of the debts of her husband. (*Burney v. Savannah Grocery Co.*, 342.)

10. PARTNERSHIP—HUSBAND AND WIFE—LIABILITY OF WIFE.—If a partnership exists between husband and wife, and she is held out to the world as one of the partners, she is liable to one who deals with the firm upon the faith of her membership. (*Burney v. Savannah Grocery Co.*, 342.)

11. PARTNERSHIP—HUSBAND AND WIFE.—Secret stipulations in partnership articles between husband and wife, limiting the wife's liability as a member of the firm, are not binding upon innocent third persons who contract with the partnership. One who extends credit, upon the faith of her full membership in the firm, is entitled to hold her responsible just as if she were a man or a feme sole. (*Burney v. Savannah Grocery Co.*, 342.)

12. MARRIED WOMEN'S RIGHT TO CARRY ON BUSINESS.—If, with the assent of a husband, his wife carried on any kind of business, she is entitled to its profits, if there is no intent to shield his property from his creditors. (*Carse v. Reticker*, 421.)

13. DEMURRER—MISJOINDER OF HUSBAND AND WIFE.—A complaint in an action to recover community property to which both husband and wife are parties plaintiff is subject to a demurrer, for misjoinder, although the statute forbids his making a gift of the community property without her consent, and the action is to recover such property alleged to have been so given away by him. (*Spreckels v. Spreckels*, 170.)

See Equity, 6; Homestead, 1-3; Judgment, 20.

INDEPENDENT CONTRACTOR.

See Municipal Corporation, 8.

INDICTMENT.

1. **INDICTMENT—VERDICT TO SUSTAIN.**—If two counts in an indictment relate to one and the same transaction, a general verdict is sufficient. (*State v. Van Wye*, 627.)

2. **SCANDALOUS PUBLICATIONS—INDICTMENT FOR CIRCULATING.**—Under a statute declaring it a felony for one to engage in editing, publishing, or disseminating a paper mainly devoted to the publication of scandals and immoral conduct, an indictment charging that on a certain day defendant engaged in disseminating and selling a certain newspaper, naming it, and alleging that it was devoted mainly to the publications of scandals, assignations, and immoral conduct, is sufficient without setting up the contents of such paper, its date, to whom sold, and like details. (*State v. Van Wye*, 627.)

See *Animals*, 5.

INFANTS.

See *Negligence*, 3; *Railroad Companies*, 5, 6.

INFORMATION.

See *Criminal Law*, 5.

INJUNCTION.

1. **INJUNCTION—JURISDICTION TO ENJOIN PROCEEDINGS IN ANOTHER STATE.**—A court of equity in one state has power to restrain its own citizens, of whom it has jurisdiction, from prosecuting suits in the courts of other states and foreign jurisdictions, whenever the facts of the case make such restraint necessary to enable the court to do justice and prevent one citizen from obtaining an inequitable advantage over other citizens. (*Hawkins v. Ireland*, 534.)

2. **JUDGMENTS—INJUNCTION AGAINST.**—The process of one court cannot be used to enjoin the final process of another court of equal and concurrent jurisdiction, although the judgment on which such final process is based is void. (*Scott v. Runner*, 345.)

See *Equity*, 6; *Fisheries*, 2, 3; *Party Walls*; *Waters and Water-courses*, 5-7.

INSANE PERSONS.

1. **AN INSANE PERSON WHOSE INCOMPETENCY HAD NOT BEEN ADJUDICATED** when he executed a deed cannot avoid it without first doing equity. (*Moran v. Moran*, 462.)

2. **THE DEED OF AN INSANE PERSON** whose incompetency has not been adjudicated is not void, nor can it be avoided in an action of ejectment, nor otherwise than by a suit in equity. (*Moran v. Moran*, 462.)

INSOLVENCY.

See *Attachment*, 3.

INSTRUCTIONS.

See *Appeal*, 5, 12.

INSURANCE.

1. **INSURANCE—REPRESENTATIONS BY INSURED AS CONDITIONS PRECEDENT.**—If an insured person contracts and warrants that if the representations made by him in his application for insurance are not true the policy shall be null and void, such representations are not conditions precedent but rather of the nature of a defeasance. (*Chambers v. Northwestern etc. Ins. Co.*, 349.)

2. CONTRACTS, PLACE OF.—A fire insurance policy written on real property situated in one state, delivered and accepted by the owner there, is a contract made in that state, and must be construed according to its laws, though issued by a foreign insurance company. (*Daggs v. Orient Ins. Co.*, 638.)

3. INSURANCE—FORFEITURE IS WAIVED, WHEN AND HOW.—A forfeiture in a policy of insurance is waived where the insurer, being fully cognizant of the facts out of which a forfeiture is claimed, treats and continues to treat the contract as binding, and induces the insurer to act in that belief. (*Hanover Fire Ins. Co. v. Bohn*, 719.)

4. INSURANCE—INSURABLE INTEREST, INSURANCE OF—WAIVER OF FORFEITURE.—When an insurance company issues its policy and accepts and retains the premium without requiring an application by the insured, and without making inquiry as to the condition of the property or the state of its title, and the insured has, in fact, an insurable interest, the company will be conclusively presumed to have insured such interest and to have waived all provisions in the policy providing for its forfeiture by reason of any facts or circumstances affecting the condition or title of the property in regard to which no such statement was required or inquiry made. (*Hanover Fire Ins. Co. v. Bohn*, 719.)

5. INSURANCE—"MORTGAGE CLAUSE" AS AN INDEPENDENT CONTRACT.—A "mortgage clause," in a policy of fire insurance, making the loss payable to a mortgagee of the insured property, and providing that the insurance shall not be invalidated by any act or neglect of the mortgagor, or owner of the insured property, is an independent contract between the insurance company and the mortgagee, and no act or omission of the mortgagor will invalidate the policy, whether it occurs before, at the time of, or subsequent to, the issuance of the policy. (*Hanover Fire Ins. Co. v. Bohn*, 719.)

6. INSURANCE—INSURABLE INTEREST—MORTGAGEE.—A mortgagee of real estate has an insurable interest therein which he may insure on his own account, and when he effects such insurance he is insuring, not the real estate, but his interest or lien therein. (*Hanover Fire Ins. Co. v. Bohn*, 719.)

7. INSURANCE—INSURABLE INTEREST—WHO HAS.—Even one who has no title, legal or equitable, in property, and no present possession or right of possession thereof, has an insurable interest therein, if he will derive benefit from its continuing to exist, or will suffer loss by its destruction. (*Hanover Fire Ins. Co. v. Bohn*, 719.)

8. INSURANCE—INSURABLE INTEREST OF MORTGAGOR AFTER SALE.—Although one mortgages his house and lot to secure the payment of a debt, for which he is personally answerable, and subsequently sells the property subject to the mortgage, he still has an insurable interest remaining in the property, for he will derive benefit from its continued existence, and will suffer loss by its destruction. (*Hanover Fire Ins. Co. v. Bohn*, 719.)

9. INSURANCE—MEANING OF "ENTIRE, UNCONDITIONAL, AND SOLE OWNERSHIP."—The terms "interest" and "title" are not synonymous terms in insurance policies. Hence a provision in a policy that it shall be void if the interest of the insured is not the entire, unconditional, and sole ownership of the property means, where the interest of a mortgagee is insured, not that he must be the owner of the legal title, but that the interest insured, namely, the mortgage lien, shall be, and is, an unconditional interest belonging to the mortgagee, and not a conditional or speculative one. (*Hanover Fire Ins. Co. v. Bohn*, 719.)

10. INSURANCE—RECOVERY BY MORTGAGEE THOUGH POLICY IS FORFEITED AS TO MORTGAGOR—CONSTRUCTION OF POLICY.—A mortgagee is entitled to recover, to the extent of his

interest, on a contract of insurance made with the owner, though the latter has transferred the insured property and assigned the policy, in violation of the contract of insurance, which provides that either of these acts shall avoid the policy, where there is attached to the policy a clause making the loss, if any, payable to the mortgagee, as his interest may appear, and where there is contained in the body of the policy a clause providing, in substance, that "if an interest shall exist in favor of a mortgagee, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto," as these two clauses must be construed together, and the "loss payable clause" must be taken as if it contained an express provision insuring the mortgagee without regard to the conditions imposed upon the owner in the body of the policy. (*Oakland Home Ins. Co. v. Bank of Commerce*, 663.)

11. **INSURANCE—INCREASE OF RISK—MORTGAGE—QUESTION OF FACT.**—Whether there has been an increase of risk or not, from the fact that property has been mortgaged, since its insurance, is a question of fact for the jury to be determined by them from the evidence, upon proper instructions from the court. (*Collins v. Merchants' etc. Ins. Co.*, 438.)

12. **INSURANCE—CONSTRUCTION OF STIPULATION AS TO ENCUMBRANCES.**—A provision in a policy of insurance that it shall be void if the property is, in any manner encumbered, "and such fact be not stated in this policy or the assured's application for insurance," is a stipulation against encumbrances existing when the contract is made, but not against future encumbrances. (*Collins v. Merchants' etc. Ins. Co.*, 438.)

13. **INSURANCE—OWNERSHIP OF PROPERTY—QUESTION FOR JURY.**—If one defense, in an action on an insurance policy, is that the insured had parted with all interest in the insured property before the policy was issued, the question as to whether he was, at the time, the owner is a proper one for the jury, where the evidence is conflicting, and their finding upon this issue will not be disturbed. (*Oakland Home Ins. Co. v. Bank of Commerce*, 663.)

14. **INSURANCE, FAILURE TO DISCLOSE FACTS.**—If an insured is not questioned respecting encumbrances on his property or other facts material to the insurance, and does not intentionally conceal them, their existence does not invalidate the policy. (*Dooly v. Hanover Fire Ins. Co.*, 26.)

15. **INSURANCE—FAILURE TO DISCLOSE EXISTENCE OF MORTGAGE—EFFECT OF.**—If an application for fire insurance is oral and no inquiries are made by the agent of the insurer as to the condition of the title to the property, and the insured says nothing about the existence of a mortgage thereon, but does not keep silent from any sinister motive, or with the intention on his part to deceive or mislead the insurer, then the fact that when the policy was issued there existed a mortgage upon the insured property will not invalidate the policy, notwithstanding the fact that the policy provides that it should be void if there existed an encumbrance, by mortgage or otherwise, against the insured property. (*Hanover Fire Ins. Co. v. Bohn*, 719.)

16. **INSURANCE—RECOVERY BY MORTGAGEE NOTWITHSTANDING OWNER'S VIOLATION OF CONTRACT—CONSTRUCTION OF CLAUSES.**—When a policy of insurance, to which is attached a clause making the loss, if any, payable to the mortgagee, as his interest may appear, provides, in the body thereof, that "if an interest shall exist in favor of a mortgagee, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto," and there is neither

in the "loss payable clause," nor in any writing upon, attached to, or appended to the policy, any provision or condition carrying the conditions of the policy into such clause, or rendering them in any manner applicable, the mortgagee is, in case of loss, entitled to recover to the extent of his interest without regard to acts or omissions of the owner which might, as between the insurer and such owner, defeat a recovery, because, in order to render the general conditions of the policy applicable to the interest of a mortgagee there must be written upon, attached, or appended to the policy, relating to the interest of the mortgagee, some provisions or conditions expressing in what manner the conditions of the policy shall be so applicable. (*Oakland Home Ins. Co. v. Bank of Commerce*, 663.)

17. **INSURANCE, INTEREST OF THE ASSURED, NO QUESTIONS BEING ASKED.**—Though a policy contains a condition declaring it to be void if the interest of the insured be other than unconditional or sole ownership, it cannot be avoided on the ground that the insured did not own the legal title, he having purchased the property and paid therefor without having received a conveyance, if no written application was made by him for the policy, and no questions were asked of him concerning his title. (*Dooley v. Hanover Fire Ins. Co.*, 26.)

18. **INSURANCE, MISTAKEN ANSWERS. WHEN DO NOT AVOID A POLICY.**—If the language of questions contained in an application for insurance calls for answers which may be, to some extent, a matter of opinion, the insured, if answering in good faith, will be excused, though he does not give the desired answer. (*Dooley v. Hanover Fire Ins. Co.*, 26.)

19. **INSURANCE—PLEDGE OF PROPERTY INSURED—MORTGAGE.**—A pledge of insured property in a mutual fire insurance association as security for the payment of the debts and liabilities of such association, is a mortgage within the meaning of a statute restricting the modes of defeating a homestead to alienation or mortgage of the property. (*Farmers' Mutual Assn. v. Burch*, 899.)

20. **HOMESTEADS—INSURANCE UPON—LIEN OF INSURER.** A member of a mutual fire insurance company whose charter provides that the insured building and the right, title, and interest of the insured to the lands on which it stands shall be pledged to the company, which shall have a lien upon such property for all debts or liabilities contracted or incurred by such company during the continuance of such insurance, cannot, in an action to recover his pro rata of losses sustained by the company, plead his homestead exemption as to land upon which his insured building stands, and all of such property may be sold to pay such loss. (*Farmers' Mutual Assn. v. Burch*, 899.)

21. **INSURANCE—LIFE AND ACCIDENT—EXCEPTED CAUSES—BURDEN OF PROOF.**—If an accident insurance policy excludes liability for injury to the insured caused by his voluntary exposure to unnecessary danger, the burden of proof is upon the insurer to show that the injury is within the excepted cause. (*Follis v. U. S. Mut. Accident Assn.*, 408.)

22. **INSURANCE—LIFE AND ACCIDENT—CONSTRUCTION OF POLICY.**—If a policy of life and accident insurance promises to pay a certain sum in case of death, "and that the payment of the various sums of indemnity herein provided is conditioned upon the same being realized from assessments upon the members of the association," while its by-laws provide for an assessment to be made "to pay losses in the event of there being no funds at hand to meet them," the beneficiary, without filing a bill in equity to compel the levy of an assessment, may sue at law to recover the amount of the policy, and need not allege nor prove that there are funds in the

treasury, nor that any assessment has been levied or moneys realized to pay the claim. (*Follis v. U. S. Mut. Accident Assn.*, 408.)

23. **INSURANCE—LIFE—REPRESENTATIONS BY INSURED—BURDEN OF SHOWING FALSITY OF.**—If a life insurance policy provides that the application for insurance shall be a part of the policy, and that if any false or fraudulent representation, statement, or warranty is made in such application the policy shall be null and void, the burden of proof is on the insurer to allege and show the falsity of such representations or statement, and he must allege specifically which of the representations he claims to be false, and he is limited in his proof to those so alleged. (*Chambers v. Northwestern etc. Ins. Co.*, 549.)

24. **INSURANCE—LIFE—REPRESENTATIONS BY INSURED—EVIDENCE.**—If, under a life insurance policy providing that the application for insurance shall be a part of the policy, and that any false or fraudulent representation made therein shall render the policy null and void, the insurer alleges that a representation made by the insured that he has "always been temperate," was false evidence as to his business habits, pursuits, and associations, at and before the time of issuing the policy, is admissible as bearing upon the question whether he was temperate or intemperate. (*Chambers v. Northwestern etc. Ins. Co.*, 549.)

25. **INSURANCE—LIFE—MEANING OF "USE OF MALT OR SPIRITUOUS BEVERAGES" AND "TEMPERATE."**—The question, "Do you use malt or spirituous beverages?" asked an applicant for life insurance, refers to a customary and habitual use, and not to a single or occasional act or use, and the question, "Have you always been temperate?" means moderation and an abstinence from excessive or injurious use, and not total abstinence from the use of malt or spirituous liquors. (*Chambers v. Northwestern etc. Ins. Co.*, 549.)

26. **INSURANCE—ACCIDENT—EXPOSURE TO UNNECESSARY DANGER.**—Within the meaning of an accident insurance policy exempting the insurer from liability to the insured, caused by his voluntarily exposing himself to unnecessary danger, it is such exposure, as matter of law, for the insured to attempt, on a dark night, to cross a railroad trestle on the ties, and on that side of the trestle having no rail, when the opposite side of the trestle is provided with a rail and plankwalk and is open for use. (*Follis v. U. S. Mut. Accident Assn.*, 408.)

27. **INSURANCE—LIVESTOCK—NOTICE OF SICKNESS.**—A provision in a livestock insurance policy, that the owner shall, in every case of sickness of an animal insured, notify the insurer thereof, by telegram, does not require such owner to so notify the insurer of the temporary sickness of an insured animal lasting but a few moments. (*Kells v. Northwestern etc. Ins. Co.*, 541.)

28. **INSURANCE—LIVESTOCK—BREACH OF WARRANTY OF OWNERSHIP.**—If the purchaser of an animal on credit gives his notes and a chattel mortgage to secure the purchase price, and then insures the life of the animal for the benefit of the vendor as his interest may appear, a provision in the contract of purchase, that if the animal shall die, the vendor shall take the insurance and give up the notes, does not constitute a breach of the policy of insurance in which the vendee is warranted to be the "sole, absolute, and unconditional owner of the animal insured." (*Kells v. Northwestern etc. Ins. Co.*, 541.)

29. **CONSTITUTIONAL LAW—INSURANCE.**—A statute providing that in all actions upon fire insurance policies "hereafter issued or renewed, the defendant shall not be permitted to deny that the property insured was worth at the time of issuing the policy, the full amount insured," is not in conflict with the fourteenth amendment

to the constitution of the United States prohibiting any state from making or enforcing any law abridging the privileges or immunities of citizens of the United States. (*Daggs v. Orient Ins. Co.*, 638.)

30. CONSTITUTIONAL LAW—INSURANCE—LOCAL LAWS—RETROSPECTIVE LAWS.—A statute providing that in all actions upon fire insurance policies "hereafter issued or renewed, the defendant shall not be permitted to deny that the property insured thereby was worth at the time of the issuing of the policy the full amount insured" is a general, and not a local or special, law, within a constitutional provision prohibiting the enactment of local or special laws "regulating the practice or jurisdiction of, or changing the rules of evidence in, any judicial proceeding or inquiry before the courts"; nor is such a statute a retrospective law nor a law impairing the obligation of contracts, nor does it deprive any person of the natural right to life, liberty, and the enjoyment of the gains of his own industry. (*Daggs v. Orient Ins. Co.*, 638.)

31. INSURANCE—FOREIGN CORPORATIONS—RESTRICTIONS.—A foreign insurance company, having availed itself of the privilege of doing business within a state under the restrictions of a valid statute thereof, its contracts of insurance therein must be governed by such statute. (*Daggs v. Orient Ins. Co.*, 638.)

32. CORPORATIONS—FOREIGN INSURANCE COMPANIES—RIGHT OF STATE TO CONTROL.—A state has power to wholly exclude foreign insurance companies from doing business within the state, or it may revoke a license already granted, or it may impose the conditions upon which it will permit them to do business within its limits. (*Daggs v. Orient Ins. Co.*, 638.)

See Corporations, 18, 19.

INTEREST.

1. INTEREST UPON INTEREST IS NOT ALLOWED UNLESS it has been contracted for in writing, and if the writing is invalid for stipulating for a greater rate than allowed by law, no interest whatever will be allowed upon the interest in default. (*Yndart v. Den*, 200.)

2. INTEREST UPON INTEREST, LIMITATION UPON RATE OF.—Under a statute declaring that the parties to any contract in writing whereby any debt is secured to be paid may agree that if the interest on such debt is not punctually paid, it shall become part of the principal and thereafter bear the same rate of interest as the principal debt, it is not within the power of the parties to make a valid agreement that interest not paid when due shall bear a rate of interest greater than that which the principal debt bears, and such agreement being invalid and no other agreement being made respecting the interest upon interest, it cannot be allowed at any rate whatever. (*Yndart v. Den*, 200.)

See Appeal, 8.

INTERSTATE COMMERCE.

POLICE POWER—SALE OF NOSTRUMS BY ITINERANTS—INTERSTATE COMMERCE.—A state statute, intended to restrain the sale of nostrums, by itinerants, who profess knowledge of the art of healing in order to make sales, is not a regulation of interstate commerce, but a valid exercise of the police power of the state, and does not contravene section 8, article 1, of the federal constitution, delegating to Congress the power to regulate commerce among the several states. (*State v. Wheelock*, 442.)

See Railroad Companies, 4.

JOINT DEBTS.
See Attachment, 1, 2.

JUDGMENT.

1. JUDGMENTS—CONCLUSIVENESS OF.—An order made by a circuit judge deciding that a person is not a party to a proceeding before him, if not appealed from, is absolutely binding upon any succeeding circuit judge, whether right or wrong, and it is beyond the power of the latter to review or reverse such order. (*Hunter v. Ruff*, 907.)

2. JUDGMENTS—CONCLUSIVENESS OF WHEN BASED ON SERVICE BY PUBLICATION.—In an action against a nonresident defendant founded on service by publication, the fact that a copy of the summons was not mailed to him at his correct place of residence, but was mailed to him at the place which the plaintiff makes oath that after inquiry he was informed was defendant's place of residence, such fact does not render the judgment void, but only voidable upon proof made in a subsequent proceeding instituted for that purpose, and such subsequent showing is not allowed to affect the validity of any proceedings taken under such judgment prior to such showing. (*Hunter v. Ruff*, 907.)

3. JUDGMENTS AGAINST NONRESIDENTS—CONCLUSIVENESS OF.—A defendant who seeks to assail a judgment recovered against him while he was a nonresident cannot divest rights of innocent purchasers which have vested before any assault has been made upon the judgment, which upon its face was entirely regular and free from infirmity at the time that the purchase was made. (*Hunter v. Ruff*, 907.)

4. JUDGMENTS OF PROBATE COURTS—CONCLUSIVENESS. A judgment of allowance of a claim entered by a probate court possesses the same conclusive force as the judgments of other tribunals. (*Moody v. Peyton*, 604.)

5. JUDGMENTS OF PROBATE COURTS—CONCLUSIVENESS. A judgment of allowance by a probate court of a note given by the decedent for the purchase price of lands is conclusive against his heirs, in an action to enforce the vendor's lien. (*Moody v. Peyton*, 604.)

6. JUDGMENT OF SISTER STATE—EFFECT OF.—If service of process upon a corporation has been had in strict conformity with the laws of the state, the judgment is entitled to have the same credit and faith given to it in another state which it has in the state wherein it was rendered. (*Gude v. Dakota Fire etc. Ins. Co.*, 860.)

7. JUDGMENT OF SISTER STATE—WHEN COMPLAINT UPON, IS SUFFICIENT TO ADMIT IN EVIDENCE A CERTIFIED COPY OF THE JUDGMENT-ROLL.—In an action upon a judgment of a sister state, a complaint alleging that the court in which the judgment was rendered was a court of general jurisdiction, and that the summons and a copy of the complaint were duly and personally served upon the defendant, states facts sufficient to admit in evidence a certified copy of the judgment-roll in said action, although the complaint in that action failed to state, in terms, that the defendant corporation was doing business in the state wherein the judgment was rendered, or had an agent therein when the action was commenced. (*Gude v. Dakota Fire etc. Ins. Co.*, 860.)

8. JURISDICTION.—A RECITAL IN A JUDGMENT of the service of process imports absolute verity, and must be so treated for all proper purposes until in some proper way the action of the court shall be successfully impeached. (*Harrison v. Hargrove*, 781.)

9. JUDGMENT BY DEFAULT, WHEN VOID—SERVICE BY PUBLICATION.—If the first service of a summons is a nullity be-

cause no affidavit or order for the publication of summons was made, a judgment by default, upon service by publication, where the summons served was not the one ordered to be published, but one that was issued two days after the order was made, is void for want of jurisdiction. (*Coffin v. Bell*, 738.)

10. JUDGMENT VOID FOR WANT OF JURISDICTION—ATTACK BY PURCHASER IS DIRECT AND NOT COLLATERAL.—One who purchases, of the owner, property which has been sold upon an execution issued under a void judgment, has a right, in an action to quiet title, to attack the judgment on the ground of lack of jurisdiction in the court rendering it, and such attack is a direct and not a collateral one. (*Coffin v. Bell*, 738.)

11. JUDGMENTS.—VOID JUDGMENTS CANNOT BE VALIDATED by citing the parties against whom they are rendered to show cause why they should not be declared valid. (*Jewett v. Iowa Land Co.*, 555.)

12. JUDGMENTS—JURISDICTION—PLEADINGS.—If relief is sought by a pleading which operates as a new and original one, no one can be personally bound by a judgment based thereon until he has been cited to appear and has been given an opportunity to be heard. A judgment without such citation and opportunity is without jurisdiction and void. (*Jewett v. Iowa Land Co.*, 555.)

13. JUDGMENTS—JURISDICTION—CROSS-BILL—COLLATERAL ATTACK.—One defendant cannot have a decree against a codefendant without a cross-bill, with proper prayer and process or answer as in an original suit; and a judgment rendered without these essential elements is without jurisdiction and may be collaterally attacked. (*Jewett v. Iowa Land Co.*, 555.)

14. JUDGMENTS—JURISDICTION—CROSS-BILL—NOTICE—COLLATERAL ATTACK.—One defendant cannot have a judgment against a codefendant upon a cross-bill demanding new and affirmative relief, upon new issues not germane to the matter alleged in the original complaint, without proper notice and citation to such codefendant to appear and have an opportunity to be heard. A judgment rendered without such notice or opportunity is without jurisdiction and void as to such codefendant and may be by him collaterally attacked and impeached. (*Jewett v. Iowa Land Co.*, 555.)

15. JUDGMENTS—COLLATERAL ATTACK—WANT OF JURISDICTION OF CROSS-BILL.—If a mechanic's lien holder brings an action simply to foreclose his lien upon one of several separate tracts of land all of which are subject to a mortgage making the mortgagor a party to the action, but he does not appear, and the mortgagee does appear and files an answer in the nature of a cross-bill praying for a foreclosure of his mortgage upon all of such separate tracts of land, but does not serve such answer upon the mortgagor who has no actual notice of the relief demanded and no constructive notice thereof, except such as is given by the filing of such answer, the court, without more, has no jurisdiction to grant the relief demanded in such answer, and its judgment of foreclosure of the mortgage based thereon is void as to the mortgagor, who may attack and impeach it in collateral proceedings. (*Jewett v. Iowa Land Co.*, 555.)

16. JUDGMENTS—LIEN OF—FAILURE TO DOCKET.—The lien of a judgment on land is not lost by the failure of the clerk of a court to enter the judgment on the judgment docket, although such real estate has passed into the hands of a bona fide purchaser without notice of such judgment. (*Johnson v. Schloesser*, 367.)

17. JUDGMENTS—FAILURE TO DOCKET—REMEDY OF BONA FIDE PURCHASER.—Under a statute making a clerk of a court liable personally and upon his official bond to any person for the amount of the damages sustained by his neglect to enter a judg-

ment on the judgment docket, a bona fide purchaser of land against which a judgment lien exists without his knowledge at the time of the purchase, has a right of action against such clerk and his sureties to recover such damages as he has sustained by reason of the neglect of the clerk to enter such judgment on the judgment docket. (*Johnson v. Schloesser*, 367.)

18. JUDGMENTS—LIEN OF ON AFTER-ACQUIRED PROPERTY—PRIORITIES.—If separate judgments in favor of different persons are obtained at different times, against the same judgment debtor, they all become liens at the same instant upon property afterward acquired by him, and neither judgment lien has any priority over the other. (*Kisterson v. Tate*, 419.)

19. JUDGMENTS.—RELIEF WILL BE GRANTED IN EQUITY against a judgment after the remedy by motion in the original action is no longer available, if no laches are imputable to the plaintiff. (*Brackett v. Banegas*, 164.)

20. JUDGMENT—RELIEF IN EQUITY—LACHES.—A plaintiff who employs an abstract company to search the records before bringing an action to foreclose a mortgage, and who, because of the failure of such company to report to him the filing of a claim of homestead, neglects to make the wife of the mortgagor a party thereto, and who for more than six months after the entry of the judgment in the action remains ignorant of such homestead claim, is not guilty of such laches as preclude him from maintaining, in equity, a suit against the wife and her husband to set aside the judgment and the proceedings thereunder and to foreclose the mortgage. (*Brackett v. Banegas*, 164.)

21. JUDGMENT, VACATING—DISCRETION OF THE COURT.—Though the trial courts have a discretion in acting upon motions for relief from judgments because of mistake and excusable neglect, this discretion ought to be so exercised as to tend, in a reasonable degree, to bring about a judgment on the merits, and where the circumstances are such as to lead a court to hesitate upon a motion to open a default, it is better, as a general rule, to resolve the doubt in favor of the application. In a plain case, the appellate court will reverse an order refusing to open a default. (*Miller v. Carr*, 180.)

22. JUDGMENT, VACATING—EXCUSABLE MISTAKE, WHAT IS.—A mistake in good faith as to the date on which summons was served, resulting in the defendant not appearing within the time allowed by law, is such a mistake as requires relief to be granted under a statute authorizing relief from a judgment taken against a defendant through his mistake, surprise, or excusable neglect. (*Miller v. Carr*, 180.)

23. JUDGMENT BY DEFAULT, VACATING FOR MISTAKE.—If a defendant against whom a judgment has been entered by default moves to set it aside, and, in support of his motion, files an affidavit of merits and also an affidavit stating that immediately after the service of the summons on him, he indorsed the words thereon "Served June 25, 1895," and that to the best of his knowledge and belief, such service was made on the 25th and not on the 24th of that month, that if such service was made on the 24th, he was then, and has ever since been mistaken as to the date, that he informed his counsel that it was served on the 25th, and that, because of such mistake, a demurrer was not served until one day too late, such motion should be granted, and the order refusing to grant it is erroneous. (*Miller v. Carr*, 180.)

24. JUDGMENTS—IMPEACHMENT FOR FRAUD.—A judgment can be impeached for fraud only when satisfactory evidence is offered that such impeaching fraud occurred in the very concoction or procurement of the judgment. (*Moody v. Peyton*, 604.)

25. JUDGMENTS, VACATING FOR WANT OF JURISDICTION, WHEN DOES NOT AFFECT PURCHASERS.—An order vacating an order of sale of real property on the ground that no service of summons had been made on the defendants, but declaring that "all orders made in the proceedings be allowed to remain on the records for the purpose of protecting purchasers and others, so far as in law they afford protection," does not deprive purchasers under the order so vacated of its protection, unless they are shown to have had notice of such want of service of process. (*Harrison v. Hargrove*, 781.)

26. THE VACATING OF A JUDGMENT ON MOTION on the ground that the summons was not served on the defendants does not prejudicially affect persons previously purchasing under such judgment and without notice of the absence of the service of process, where the want of jurisdiction was not disclosed by the record. (*Harrison v. Hargrove*, 781.)

See Appeal, 2; Equity, 5; Executors and Administrators, 8; Guardian and Ward, 5, 7, 8, 10; Injunction, 2; Mines and Mining, 3; Negotiable Instruments, 8; Officers, 3, 10.

JUDICIAL SALES.

See Execution, 3; Mortgages, 13.

JURISDICTION.

JURISDICTION—FOREIGN COURTS—PROOF OF.—Proof of the fact that a foreign court uniformly exercises jurisdiction over a subject is prima facie sufficient to show jurisdiction. (*Robertson v. Stard*, 569.)

See Attachment, 10; Court; Guardian and Ward, 7; Injunction, 1; Judgment, 8-10, 12-15, 26; Justice of the Peace, 1-4; Process, 3.

JURY TRIAL.

See Equity, 2; Trial; Quo Warranto.

JUSTICE OF THE PEACE.

1. JUSTICE'S COURTS HAVE NO JURISDICTION of actions for damages to real estate. (*Bagley v. Columbus Southern Ry. Co.*, 325.)

2. JUSTICE'S COURTS—JURISDICTION—DAMAGES TO FENCES AND CROPS.—A justice's court has no jurisdiction of an action for damages caused by the negligence of a railway company in setting fire to and burning fences inclosing an owner's lands and destroying its pasture and unmatured crops. (*Bagley v. Columbus Southern Ry. Co.*, 325.)

3. JUSTICE'S COURTS—JURISDICTION—ADJOURNMENT.—If, after the pleadings are closed, a justice of the peace adjourns the case for three days as authorized by statute, he does not lose jurisdiction to hear the case on the adjourned day by reason of the fact that he has omitted to state in his docket upon whose motion the adjournment was had. (*Wheeler v. Paterson*, 527.)

4. SURETYSHIP—REPLEVIN BOND—OMISSION OF NAME OF SURETY ON BOND—JURISDICTION.—The fact that the name of a surety who signs and seals a replevin bond is omitted from the body thereof does not affect the jurisdiction of a justice's court to issue the writ of replevin and hear the case. (*Wheeler v. Paterson*, 527.)

5. SURETYSHIP—REPLEVIN BOND—JURISDICTION.—The fact that the sureties on a replevin bond do not justify and that the bond is not acknowledged does not affect the jurisdiction of the jus-

tice's court to issue the writ of replevin and hear the case. (*Wheeler v. Paterson*, 527.)

LABORERS.

See *Mechanic's Lien*, 6-8.

LACHES.

See *Executors and Administrators*, 1-5; *Judgment*, 19, 20.

LANDLORD AND TENANT.

LANDLORD AND TENANT—LEASE, CONSTRUCTION OF —LESSEE'S LIABILITY FOR LEASED PROPERTY.—If a lease provides that the leased property shall be returned, "in as good condition as it now is, usual wear excepted," the tenant is not liable in damages, if the property is, during the term of the lease, destroyed by fire without fault on his part. (*Seever v. Gabel*, 881.)

LARCENY.

See *Criminal Law*, 2.

LICENSE.

See *Fisheries*, 1; *Statutes*, 4.

LIENS.

1. LIENS—LOGGERS—LABOR BY TEAMS AND TEAMSTERS.

One who furnishes teams and teamsters at a gross price per month employed in skidding, hauling, and banking logs is entitled to a lien under a statute providing that any person who may do or perform any manual labor in cutting, banking, driving, rafting, cribbing, or towing any logs shall have a preferred lien thereon as against the owner thereof and all other persons for the amount due for such services. (*Breault v. Archambault*, 545.)

2. LIENS—LOGGERS—WHO ENTITLED TO.—A BLACK-

SMITH employed at a logging camp in shoeing horses and in repairing sleds and tools, used by the men engaged in cutting, hauling, and banking logs, is entitled to a lien thereon under a statute providing that any person who may do or perform any manual labor in cutting or banking any logs shall have a preferred lien thereon as against the owner thereof, and all other persons for the amount due for such services. (*Breault v. Archambault*, 545.)

3. LIENS—LOGGERS—WHO ENTITLED TO.—COOKS.—A cook and his assistant, employed at a logging camp in cooking for the men engaged in cutting, hauling, and banking logs are entitled to a lien thereon under a statute providing that "any person who may do or perform any manual labor in cutting, banking, driving, rafting, cribbing, or towing any logs" shall have a preferred lien thereon as against the owner thereof and all other persons for the amount due for such services. (*Breault v. Archambault*, 545.)

See *Attachment*, 8; *Corporations*, 15, 16; *Covenants*, 2; *Insurance*, 20; *Judgment*, 16, 18; *Mechanic's Lien*.

LIFE TENANTS.

See *Estates*, 3-6.

LIMITATIONS OF ACTIONS.

1. PAYMENT—STATUTE OF LIMITATIONS—WHAT CONSTITUTES.—PART PAYMENT, within the meaning of a statute which does not say by whom, nor under what circumstances, a payment

must have been made upon a note in order to arrest the running of the statute of limitations, is a voluntary payment, made by the debtor himself, or by some one authorized by him to make the payment. (*Moffitt v. Carr*, 696.)

2. PAYMENT—STATUTE OF LIMITATIONS—PART PAYMENT BY SALE OF PROPERTY ON EXECUTION OR OTHER LEGAL PROCESS.—A payment made on a debtor's note by the sale of his property on execution, or other legal process, is not such part payment by the debtor as will have the effect of arresting the running of the statute of limitations, under a statute which does not say by whom, nor under what circumstances, a payment must have been made upon a note in order to have that effect. (*Moffitt v. Carr*, 696.)

3. PAYMENT—STATUTE OF LIMITATIONS—PART PAYMENT BY INDORSEMENT, ON NOTE, OF PROCEEDS OF SALE OF MORTGAGED PREMISES.—If a trustee sells lands mortgaged by a trust deed to secure the payment of a note, the payment of the proceeds of the sale to the holder of the note, and the latter's indorsement of the payment on the note, is not, as to the mortgagor, such part payment on the note as will take it out of the operation of the statute of limitations. (*Moffitt v. Carr*, 696.)

See Attorney and Client, 1-3.

LIS PENDENS.

LIS PENDENS.—THE OFFICE OF the filing of notice of the pendency of an action is merely to charge subsequent purchasers with notice of the pendency of the action. (*Jewett v. Iowa Land Co.*, 555.)

LOGGER'S LIEN.

See Liens.

MALICIOUS PROSECUTION.

1. MALICIOUS PROSECUTION.—An arrest under a void warrant, although the basis for an action for false imprisonment, cannot sustain an action for malicious prosecution. (*Satilla Mfg. Co. v. Cason*, 287.)

2. MALICIOUS PROSECUTION—VOID PROCEEDINGS, NOT BASIS FOR.—It is essential to the institution of an action for malicious prosecution that a prosecution upon some criminal charge should have been instituted and ended. If the proceeding instituted was void as wanting in any of the constituent elements of a proceeding authorized by law, then it was no prosecution, and cannot be the basis for an action. (*Satilla Mfg. Co. v. Cason*, 287.)

3. MALICIOUS PROSECUTION—ARREST UNDER UNAUTHORIZED WARRANT.—An affidavit and warrant under which a person is arrested, alleging that he "did commit the offense of trespass by digging up and grading a certain street or alley through the lands" of another, neither charges a criminal offense, nor the commission of any act amounting to a constituent element of such an offense, and cannot be made the basis of an action for malicious prosecution. (*Satilla Mfg. Co. v. Cason*, 287.)

4. PROCESS. ABUSE OF.—AN ACTION will lie for a malicious abuse of legal process. (*Nix v. Goodhill*, 434.)

MANDAMUS.

1. MANDAMUS—INSPECTING BOOKS OF CORPORATION—STATUTE—PLEADING.—A statute authorizing a stockholder of a corporation to inspect the original record, stock, and transfer books, and the record of the financial conditions of the company, does not,

perhaps, if strictly construed, confer the right to inspect the original papers and vouchers of the corporation. Hence, in mandamus proceedings by a stockholder to compel an examination of the original papers and vouchers, he should plead and prove that some property right is involved, or that some controversy exists, or that some specific and valuable interest is in question, to settle which an inspection of these documents becomes necessary. (*Elsworth v. Dorwart*, 427.)

2. CORPORATIONS—RIGHT TO INSPECT BOOKS AND PAPERS—DISCRETION OF COURT.—If a statute confers, in absolute terms, a right to inspect certain books and papers of a corporation, the court has no discretion on mandamus proceedings by a stockholder to refuse the exercise of the right, in any case, except where it is clearly apparent that the purpose of asking it is to gratify an idle whim, or to perplex, annoy, or harass the officers having the books and papers in charge. (*Elsworth v. Dorwart*, 427.)

MARRIAGE AND DIVORCE.

1. DOWER—ESTATE BY WILL—ELECTION—RIGHTS OF HEIRS.—If a homestead is embraced within a farm which contains other lands, and a widow is given, by her husband's will, a life estate in the entire farm, her occupancy of the homestead is consistent with the life estate given by will, and is not an election to take the homestead instead of such life estate. She has a right to take under the will and also her dower, and her failure to have her dower set apart to her during her lifetime will not prevent her heirs from receiving the same after her death. (*Hunter v. Hunter*, 455.)

2. DOWER—WHEN TAKING UNDER WILL DOES NOT DEFEAT.—A widow may take a life estate under her husband's will without defeating her right of dower, which must be allowed to her, unless it would be inconsistent with the will, and such allowance is not inconsistent where the will devises a life estate with a remainder over, has no express provision prohibiting the taking of dower, and contains no statement that the provision made is intended to be in lieu of that made by law. (*Hunter v. Hunter*, 455.)

MARRIED WOMEN.

See Husband and Wife.

MASTER AND SERVANT.

1. MASTER AND SERVANT—MINING—SAFE PLACE IN WHICH TO WORK.—Though it is the practice in mining, after ore has been excavated, to support the roof by putting up timbers, the room made thereby cannot be said to be a place furnished to servants in which to carry on their master's business, and which he must, at his peril, keep in a reasonably safe condition. His duty is performed by using reasonable care in furnishing suitable material and employing capable and efficient men to do the work. (*Petaja v. Aurora Iron Mining Co.*, 505.)

2. MINING—FELLOW SERVANTS.—Miners who loosen and bring down ore to the floor of a mine and laborers who load it upon cars are fellow-servants. Hence, the latter cannot recover of the owner of the mine for the negligence of the former. (*Petaja v. Aurora Iron Mining Co.*, 505.)

3. MINING—SAFE PLACE IN WHICH TO WORK—DUTY TO FURNISH.—It is not the duty of a mining corporation to furnish a safe place in which the miners may work, if the progress of their work necessarily renders the place unsafe until it is properly timbered, and the practice is for them to notify the timbermen when

their services are required, and no such notice being given, the place becomes unsafe through want of timbering, and an injury thereby results. (*Petaja v. Aurora Iron Mining Co.*, 505.)

4. MINING—LIABILITY OF COMPANY TO LABORERS INJURED BY UNSAFE TIMBERING.—If miners are put to work in a mine where it is the practice, as ore is removed, to support the roof by timbers upon notice from the miners themselves or from a shift boss, or foreman, having charge of the work, a laborer cannot recover for injuries received by the failure to timber the place from which ore had been removed, if the miners had not caused the timbermen to be notified that their services were required, though such miners had called the attention of the shift boss to some indications of danger, and he had directed them to resume work. If there was negligence either on the part of this boss or of any miner, it was the negligence of a fellow-servant, for which no recovery can be had. (*Petaja v. Aurora Iron Mining Co.*, 505.)

MECHANIC'S LIEN.

1. MECHANIC'S LIEN ON SEPARATE TRACTS FOR ONE AMOUNT.—One who does work and furnishes materials for the improvement of two separate tracts of land is not entitled to a mechanic's lien on both tracts, for the aggregate amount claimed, unless the work was done and the materials furnished under an entire contract. (*Meek v. Parker*, 119.)

2. MECHANIC'S LIEN—LEASEHOLD ESTATE.—A mechanic's lien attaches to a leasehold estate in favor of one who has, under a contract with the lessee, furnished materials for the improvement of land leased for a term of years. (*Meek v. Parker*, 119.)

3. MECHANIC'S LIEN—WAIVER BY ACCEPTANCE OF NOTE.—One who takes a note in settlement of his account for materials furnished for the improvement of land does not waive his right to a mechanic's lien for such materials, unless the note was accepted in absolute payment of the debt. Nor does the transfer of the note, before maturity, operate as a waiver of the lien, where the payee takes it up at maturity. (*Meek v. Parker*, 119.)

4. MECHANIC'S LIEN.—IF "DRY KILN WHEELS AND BOXES," designed and built expressly for use on a tramway leading into a certain dry kiln or long shed, boarded up on both sides, covered over the top, and used for drying lumber, have no value apart from such kiln, and without which the kiln cannot be used unless its structure is altered, they are, although not actually fastened to such tramway, constructively attached to, and a part of, the building within the meaning of the mechanic's lien act. (*Meek v. Parker*, 119.)

5. MECHANIC'S LIEN—STEEL WRENCHES AND RUBBER BELTING.—Although a statute gives a mechanic's lien to every person who shall "furnish any materials, machinery, or fixtures for any building, erection, or other improvement upon land," under a contract with the owner, one who furnishes steel wrenches and rubber belting, which are not, in any manner, attached to the land, though used in connection with a sawmill or dry kiln, is not entitled to a lien for the price thereof. (*Meek v. Parker*, 119.)

6. LABORERS—CLERKS AS—PLEADING.—"Although the intervention filed in the present case alleged in general terms that the intervenor was a clerk, that the amount he claimed was due him for services and labor performed as a clerk, and that as such clerk he performed manual labor, yet, as it failed by other appropriate allegations to show to which of the classes above indicated he belonged, it was bad for uncertainty and properly dismissed on demurrer." (*Oliver v. Macon Hardware Co.*, 300.)

7. LABORERS—CLERKS AS—GENERALLY, a clerk in a mercantile establishment is not a "laborer" within the meaning of lien and exemption laws, even though, in the discharge of his duties, he is necessarily called upon to perform a considerable amount of manual labor. Whether such clerk is entitled, as a "laborer," to enforce a summary lien against the property of his employer must be determined by the peculiar facts and circumstances of each particular case. (*Oliver v. Macon Hardware Co.*, 300.)

8. LABORERS—CLERKS AS—LIENS AND EXEMPTIONS.—"Primarily, a clerk in a mercantile establishment is not a 'laborer,' in the sense in which that word is used in section 1974 of the Georgia code, even though the proper discharge of his duties may include the performance of some amount of manual labor. If the contract of employment contemplated that the clerk's services were to consist mainly of work requiring mental skill, or business capacity, and involving the exercise of his intellectual faculties, rather than work the doing of which properly would depend upon a mere physical power to perform ordinary manual labor, he would not be a 'laborer.' If, on the other hand, the work which the contract required the clerk to do was, in the main, to be the performance of such labor as that last above indicated, he would be a laborer. In any given case, the question whether or not a clerk is entitled, as a laborer, to enforce a summary lien against the property of his employer, must be determined with reference to its own particular facts and circumstances." (*Oliver v. Macon Hardware Co.*, 300.)

9. MECHANICS' LIENS—PLEADINGS.—The provisions of a mechanic's lien law for filing, instead of serving, pleadings, apply only to issues tendered by the complaint, or expressly authorized by the statute, and not to pleadings in the nature of cross-bills, setting up matters outside of, and foreign to, such issues. (*Jewett v. Iowa Land Co.*, 555.)

MINES AND MINING.

1. MINING PATENTS.—IF A VEIN ENTERS ONE SIDE OF A MINING CLAIM as located and patented, and goes out at another side without crossing either end line or running parallel or nearly parallel with the side lines of the claim, the owners of the claim have no right to pursue such vein if it departs from the side lines of their location. (*Catron v. Old*, 256.)

2. MINING PATENTS—RIGHT TO CROSS-LODES.—If a vein in its strike across the country runs parallel to the side lines of a claim, the owner of the apex has the right to follow the vein to any depth in its dip beneath the surface, although in so doing he passes beyond the side lines of his claim into adjoining territory, but when the strike of the vein is across the side lines of the claim, no extra-territorial rights are acquired by reason of the ownership of the apex. (*Catron v. Old*, 256.)

3. JUDGMENT IN CONTROVERSY CONCERNING MINING CLAIMS, SUFFICIENCY OF.—In a judgment in ejectment for part of a mining claim, it is not essential, under the statute of Colorado, that the portion of the vein on which a trespass has been committed, and for which judgment is entered, be described with mathematical certainty. (*Argonaut Con. Mining etc. Co. v. Turner*, 245.)

4. MINING PATENTS—CROSS-VEINS.—If the course of a vein is across a claim as located upon the surface, instead of in the direction of its length, the side lines of the location become end lines, and the end lines side lines, but this, so far as lateral rights are concerned, does not invalidate the patent to any part of the territory included therein. (*Argonaut Con. Mining etc. Co. v. Turner*, 245.)

5. A PATENT FOR MINERAL LAND CARRIES WITH IT the right to the surface territory described therein, together with all

lodes and veins having their tops or apices within such surface territories. except, perhaps cross-lodes. (Argonaut Con. Mining etc. Co. v. Turner, 245.)

See Ejectment, 2; Master and Servant, 1-4.

MINING PATENTS.

See Mines and Mining, 4, 5.

MISDEMEANOR.

See Nuisance, 2.

MISTAKE.

See Insurance, 18; Judgment, 22, 23.

MORTGAGES.

1. A MORTGAGE OF REAL PROPERTY DOES NOT CONVEY THE LEGAL TITLE, though it contains a power of sale, unless such power is exercised while the mortgagor remains the owner of such legal title. (Team v. Baum, 893.)

2. MORTGAGE—POWER OF SALE, EFFECT UPON OF CONVEYANCE BY MORTGAGOR.—If, after executing a mortgage containing a power of sale, the mortgagor conveys the property to a third person a sale made under the power is inoperative, because it is in substance a sale by the mortgagor, who has already parted with his entire title. The only remedy of the mortgagee is by suit to foreclose. (Team v. Baum, 893.)

3. MORTGAGES—DESCRIPTION—PAROL EVIDENCE TO AID.—If land is described in a mortgage by specified number of lots situated in a certain state, county, and district, and as being "the land purchased by J. L. Henson of J. E. Derrick," the description, as a whole, is not so totally defective and uncertain as to render the mortgage inadmissible in evidence on a suit to foreclose it. Such description may be aided, and the land covered by the mortgage identified, by parol evidence. (Derrick v. Sams, 309.)

4. MORTGAGE, SECOND SUIT TO FORECLOSE.—If a judgment foreclosing a mortgage is void because the mortgagor's wife is not a party thereto, and the property is a homestead, and the court in which action is brought has lost the right to set aside such judgment on motion, a second suit may be maintained to which the wife, as well as the husband, is a party, to set aside the former judgment and the proceedings thereunder and to foreclose the mortgage. (Brackett v. Banegas, 164.)

5. MORTGAGES — FORECLOSURE — INSUFFICIENT DEFENSE.—The fact that land covered by a mortgage has been set apart to the widow of the mortgagor for her support, against objections filed by the mortgagee, does not bar his right to foreclose the mortgage. (Derrick v. Sams, 309.)

6. MORTGAGES — FORECLOSURE — DEFENSE.—A plea in opposition to a proceeding to foreclose a mortgage alleging that at the time of the execution of the mortgage the mortgagor "was very old and sick, and unable to write his name, but made his mark, and that he was heavily under the influence of opiates, and, at the time, in a comatose condition, and was wholly unable to make any sort of contract . . . that the mortgagor was unable to read the contract, that it was never read over to nor understood by him, and that if it had been read to him he could not have understood it," states a good defense to the proceeding and should not be stricken out. (Derrick v. Sams, 309.)

7. MORTGAGE, ASSIGNMENT OF—POWER OF SALE.—The assignment of a note and mortgage does not vest the assignee with the power of sale conferred in the mortgage on the mortgagee, nor does it vest the assignee with the legal title conveyed to the mortgagee by the mortgage. (*Hussey v. Hill*, 789.)

8. MORTGAGE, ASSIGNMENT TO MORTGAGOR.—If a mortgagor purchases his own note, which is secured by a mortgage, the transaction does not operate as an assignment, but as a satisfaction, and leaves the land subject to a second mortgage, if there is one. (*Hussey v. Hill*, 789.)

9. ESTOPPEL.—IF THE HOLDER OF THE FIRST AND SECOND MORTGAGES on real property sells to the mortgagor the note secured by the first mortgage, he is not thereby estopped from insisting that such sale operates as a satisfaction of the first mortgage, and leaves the property subject to the second only. (*Hussey v. Hill*, 789.)

10. MORTGAGES—EFFECT OF ASSIGNING ONE OF SEVERAL SECURED NOTES.—The transfer of a note secured by mortgage transfers the mortgage security to the purchaser without any assignment of the mortgage itself; and where there are several notes secured by the same mortgage the assignment of one of the notes is an assignment of a proportionate interest in the mortgage. (*Cram v. Cotrell*, 714.)

11. MORTGAGES—ASSIGNMENT OF SECURED NOTE—RIGHTS OF PURCHASER.—If a note secured by mortgage has been assigned, a purchaser of the mortgaged premises, in good faith, without notice of the assignment, will be protected by a release of the mortgage executed by the original mortgagee. (*Cram v. Cotrell*, 714.)

12. MORTGAGES—RIGHT OF JUNIOR MORTGAGEE TO REDEEM.—A junior mortgagee who has not been made a party to a proceeding foreclosing a senior mortgage is entitled to redeem the property sold at a judicial sale under such foreclosure; and his right of redemption, in such a case, is one of right, which a court cannot deny on the ground that its exercise would be unprofitable. (*Cram v. Cotrell*, 714.)

13. MORTGAGES—REDEMPTION—CREDIT FOR IMPROVEMENTS—WHO IS NOT A BONA FIDE PURCHASER.—If a purchaser at a judicial sale buys in good faith, believing that he is getting a perfect title, he is entitled, upon a redemption of the property, to a credit for improvements made thereon; but one who buys property sold under foreclosure proceedings, with notice of the facts, is not a purchaser in good faith, and is not entitled to such credit. (*Cram v. Cotrell*, 714.)

See Acknowledgment, 1, 2; Appeal, 6; Estates, 3; Homestead, 1, 2; Husband and Wife, 6, 7; Insurance, 5, 6, 8-11, 15, 16, 19; Judgment, 20; Suretyship, 3.

MUNICIPAL CORPORATIONS.

1. MUNICIPAL CORPORATIONS—CHARTER, FAILURE TO RECORD AMENDMENTS.—If amendments to a charter are adopted by a vote of the electors, the failure to record them in the charter-book by the proper officer does not deprive them of their effect. The only object to be attained by recording them in a particular manner is to enable the courts of the state to take judicial notice of them without other evidence. (*State v. Doherty*, 39.)

2. CONSTITUTIONAL LAW—SPECIAL LEGISLATION.—Under the constitution of Colorado, the legislature may amend the charter of a municipality enacted before the adoption of such constitution, the only limitation imposed being that the amendment

must be revisory or amendatory of a pre-existing charter. (*Cunningham v. City of Denver*, 212.)

3. **CONSTITUTIONAL LAW—ORDINANCES—PERSONAL LIBERTY.**—A municipal ordinance making it a crime for "anyone knowingly to associate with persons having the reputation of being thieves, burglars, pickpockets, pigeon droppers, bawds, prostitutes, or gamblers, or any other person, for the purpose or with the intent to agree, conspire, combine, or confederate to commit any offense, or to cheat or defraud any person of any money or property," is unconstitutional as being an invasion of the rights of personal liberty. (*Ex parte Smith*, 576.)

4. **MUNICIPAL CORPORATIONS—RULES FOR GOVERNMENT OF CITY COUNCIL—ORDINANCES—REPEAL.**—Rules for the government of a city council duly ordained and enacted by it, are in effect an ordinance, and cannot be repealed by a mere verbal and general motion to that effect. (*State v. Swindell*, 375.)

5. **MUNICIPAL CORPORATIONS, NOTICE TO OF CLAIMS FOR INJURIES, CONSTITUTIONALITY OF STATUTE REQUIRING.**—A statute providing that before a municipality therein named will be held liable to any person injured upon any of its streets or public places, such person, or some one in his behalf shall, within thirty days after receiving such injuries, give the mayor or city council notice in writing of such injuries, stating when, where, and how they occurred, and the extent thereof, is constitutional. (*Cunningham v. City of Denver*, 212.)

6. **MUNICIPAL CORPORATIONS—ORDINANCE REQUIRING "TRANSIENT MERCHANTS" TO PAY A LICENSE.**—The term "transient merchant," in an ordinance requiring a license fee from all transient merchants no matter where they reside, relates to the character of the business carried on, and has no reference to the residence of the individual; and such an ordinance is uniform in its operation, is not class legislation, and is not a discrimination in favor of resident merchants. (*Ottumwa v. Zekind*, 447.)

7. **MUNICIPAL CORPORATIONS—ORDINANCE REQUIRING "TRANSIENT MERCHANTS" TO PAY A LICENSE—REASONABleness.**—Municipal authority, given by statute, "to regulate and license" sales made by transient merchants, does not authorize a city ordinance requiring transient merchants to pay a license fee of two hundred and fifty dollars per month, or twenty-five dollars a day, if the license is issued only for a short period, and such ordinance is, therefore, void for unreasonableness. (*Ottumwa v. Zekind*, 447.)

8. **MUNICIPAL CORPORATIONS—OFFICE, APPOINTMENT TO, WHEN MUST BE CONFIRMED.**—An appointment to a municipal office need not be confirmed by the city council, if an amendment to its charter provides that the person appointed by the mayor shall hold office at the pleasure of the appointing power, and that conflicting provisions of the charter shall be deemed amended accordingly. (*State v. Doherty*, 39.)

9. **MUNICIPAL CORPORATIONS—INDEBTEDNESS IN EXCESS OF CONSTITUTIONAL LIMITATION.**—A contract made by a city for a necessary or annual expense, as a fire alarm system, at a time when such city is indebted beyond the limit fixed by the state constitution, and when it has no money in its treasury to meet such contract at that time, nor when it is completed or accepted is void, although the city has sufficient money to pay at the time fixed by the contract for such payment. (*Laporte v. Gamewell Fire Alarm Tel. Co.*, 359.)

10. **MUNICIPAL CORPORATIONS—LIMITATIONS ON INDEBTEDNESS.**—Under constitutional limitations on the power of a city to incur indebtedness, the municipality may, after it has reached

its limit, anticipate the collection of the revenue appropriated to its use by drawing warrants against taxes levied, but not collected, thus substantially appropriating and assigning the amount drawn to the holder of the warrant; but, in such case, the tax must not only have been levied, but the warrant must be drawn, payable out of the particular fund, and be such in legal effect as to discharge the municipality from all liability. (*Laporte v. Gamewell Fire Alarm Tel. Co.*, 359.)

11. MUNICIPAL CORPORATIONS—INDEBTEDNESS.—Municipal obligations payable out of a particular fund, and for which the fund only, and not the municipality, is liable, are not within constitutional limitation on the power of a city to contract debts. (*Laporte v. Gamewell Fire Alarm Tel. Co.*, 359.)

12. MUNICIPAL CORPORATIONS—INDEBTEDNESS—CONSTITUTIONAL LIMIT.—Whenever a city, whose indebtedness exceeds the constitutional limit, does not have money arising from current revenues to meet its debts, of whatever character, as they come into existence, or, having the money, does not pay them, the city is indebted and the constitution violated. (*Laporte v. Gamewell Fire Alarm Tel. Co.*, 359.)

13. MUNICIPAL CORPORATIONS—INDEBTEDNESS—CONSTITUTIONAL LIMIT.—If the current revenues of a city are sufficient to fully pay its current expenses, necessarily incurred to sustain corporate life, no indebtedness is created, but a debt cannot be incurred beyond the constitutional limit, even for current expenses, no matter how urgent. (*Laporte v. Gamewell Fire Alarm Tel. Co.*, 359.)

14. MUNICIPAL CORPORATIONS—INDEBTEDNESS—CONSTITUTIONAL LIMIT.—If a city has money to pay its indebtedness when it comes into existence without exceeding the constitutional limit, there is no indebtedness and no violation of the constitution; but, if the indebtedness of the city already equals or exceeds the constitutional limit, and the current revenues are not sufficient to pay such indebtedness when it comes into existence, together with all its other expenses, an indebtedness is thereby created and the constitution violated. (*Laporte v. Gamewell Fire Alarm Tel. Co.*, 359.)

15. MUNICIPAL CORPORATIONS—INDEBTEDNESS.—If a municipal corporation contracts for a usual or necessary thing, and agrees to pay for it annually or monthly, as furnished, the contract does not create an indebtedness for the aggregate sum of all the installments. (*Laporte v. Gamewell Fire Alarm Tel. Co.*, 359.)

16. A MUNICIPAL CORPORATION IS NOT LIABLE FOR INJURIES RECEIVED from the neglect to keep its streets in repair, unless it had notice of the defect complained of, or of facts equivalent to such notice. (*Cunningham v. City of Denver*, 212.)

17. MUNICIPAL CORPORATIONS—CONTRACTOR, LIABILITY FOR ACTS OF.—A city is answerable for the negligence of a contractor working upon the public streets if, by its charter and the terms of the contract, the work is practically under the control and management of its engineer, and it has the right not only to control the work, but to discharge all persons employed thereon who neglect or refuse to obey the engineer in charge. (*Brown v. Seattle*, 46.)

18. INDEPENDENT CONTRACTOR, WHO IS NOT.—Persons contracting to do work on the public streets of a city are not independent contractors if, by the law and terms of their contract, the municipality has through its officers the right to control the work and to discharge all persons employed thereon who neglect or refuse to obey its engineer in charge. (*Brown v. Seattle*, 46.)

19. MUNICIPAL CORPORATIONS—DAMAGES TO LEASEHOLD FROM PUBLIC IMPROVEMENTS—EVIDENCE.—A leaseholder

who has been compelled to abandon his premises by reason of their being rendered valueless for business purposes for which they were leased, by public improvement constructed in the street adjoining them, is entitled to recover from the municipality the market value of the leased premises for rent for the unexpired term of the lease. In such case the profits of the business cannot be recovered by way of damages; but evidence that the business, was profitable is admissible to show the value of the premises for rent. On the other hand, evidence of an option to extend the lease for two years upon the expiration of the original term, at the mutual agreement of the parties to the lease, is not admissible to enable the tenant to recover damages to the rental value of the premises after the expiration of the original term. (Pause v. City of Atlanta, 290.)

20. MUNICIPAL CORPORATIONS—MEASURE OF DAMAGES TO LEASEHOLD FROM PUBLIC IMPROVEMENT.—If according to a plan of a proposed public improvement in a street, its completion would result either in the total exclusion of a leaseholder from his premises, or would make them so inconvenient as to render them valueless to him for the purpose for which they were leased, he may properly abandon his lease and vacate the premises, whenever, in the execution of the projected plan of construction, the work has so far progressed as virtually to destroy the lease by preventing the tenant from enjoying his estate. He is then entitled to recover from the municipal authorities, the market value of the premises for rent for the unexpired term of the lease. In such case neither the profits of the business conducted on the premises, nor the cost to the tenant of fixtures and improvements placed thereon, nor the cost of articles purchased for the purpose of enabling the lessee to conduct the business, nor the diminution in value of such fixtures, improvements, or articles such as are removed by the lessee of the premises can be recovered as damages; but the increased value of the premises for rent, in consequence of the putting in of such fixtures and improvements, may properly be considered in computing the damages to the leasehold estate. (Pause v. City of Atlanta, 290.)

21. MUNICIPAL CORPORATIONS—DAMAGES FROM PUBLIC IMPROVEMENTS.—If the property of an adjacent lot or lease holder is directly and permanently injured by a public improvement constructed in the street by municipal authority, he may maintain an action to recover the damages resulting to him therefrom. (Pause v. City of Atlanta, 290.)

22. MUNICIPAL CORPORATIONS—WATERWORKS, SALE OF—UNAUTHORIZED PAYMENT AND ITS EFFECT.—If a city, under authority of its charter, constructs and maintains a system of waterworks at the public expense, and for public use, and its council attempts to sell and transfer the waterworks, without legislative authority, the city may regain possession thereof, without refunding to the pretended purchasers the amount of money paid by them into the city treasury as the consideration of the purchase, where it has not been appropriated by the council to any city purpose, or in any manner used by it. Such payment into the city treasury is unauthorized, for the money does not belong to the city, and the treasurer has no authority to receive it. His mere receipt, therefore, of the money, does not bind the city to refund it, and cannot estop the city from recovering the property. (Huron Waterworks Co. v. Huron, 817.)

23. MUNICIPAL CORPORATIONS—SALE OF PROPERTY—CONSTRUCTION OF CHARTER.—Power conferred, in general terms, upon a city, by its charter, to sell and dispose of the property of the city is limited to that class of property held strictly as private property, and not charged with any public use. (Huron Waterworks Co. v. Huron, 817.)

24. MUNICIPAL CORPORATIONS—WATERWORKS — RIGHT TO SELL.—If a city, vested by its charter with power to construct and maintain a system of waterworks, at the public expense and for public use, exercises such power, the waterworks property is held by the city for public use, and is, therefore, charged with a public trust, of which the city cannot divest itself without express legislative sanction. Hence, a sale and transfer of the property, by the common council of the city, without legislative authority is void. (*Huron Waterworks Co. v. Huron*, 817.)

25. MUNICIPAL CORPORATIONS—WATERWORKS—PUBLIC USE AND TRUST—BENEFICIARIES.—If a city is empowered, by its charter, "to construct and maintain waterworks," which are constructed, maintained, and used, at the expense of its inhabitants, for protection against fires and for furnishing pure water for domestic purposes, such works are owned and held by the city as the trustee of its citizens, and for the use and benefit of such citizens, who are the beneficiaries. In other words, the property is held for public use and is charged with a public trust. (*Huron Waterworks Co. v. Huron*, 817.)

26. MUNICIPAL CORPORATIONS—WATERWORKS.—THE POWER TO CONSTRUCT a waterworks system for a city is not a necessary incident of its charter, but must, like all its other powers be derived directly from the legislature; and the power given by charter "to construct and maintain" such a system implies a duty of the city, through its corporate authorities, to maintain and preserve the waterworks property for the benefit of the public. (*Huron Waterworks Co. v. Huron*, 817.)

27. MUNICIPAL CORPORATIONS—WATERWORKS — NATURE AND CHARACTER OF.—There is no distinction between the nature of waterworks property owned and held by a city, and public parks, squares, wharves, quarries, hospitals, cemeteries, city halls, courthouses, fire engines and apparatus, and other property owned and held by the city for public use. All such property is held by the city as a trustee in trust for the use and benefit of the citizens of the municipality. (*Huron Waterworks Co. v. Huron*, 817.)

See Counties, 3; Estates, 2; Railroad Companies, 1, 2.

NEGLIGENCE.

1. NEGLIGENCE IS THE FAILURE to exercise such care, prudence, and forethought as duty, under the circumstances, requires should be given and exercised. It is the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or the doing of something which a prudent and reasonable man would not do. (*Brotherton v. Manhattan Beach Imp. Co.*, 709.)

2. NEGLIGENCE.—PLAINTIFF'S CONTEMPORANEOUS CONCURRING NEGLIGENCE, directly contributing to his injury, is a complete defense to his action to recover therefor. (*Spillane v. Missouri Pacific Ry. Co.*, 580.)

3. NEGLIGENCE—DEGREE OF CARE REQUIRED OF INFANT.—While it is not presumed that a boy nine years of age is capable of exercising that degree of prudence exacted of an adult, yet he must exercise such degree of care as is commensurate with the intelligence, capacity, and experience which he is shown to possess. (*Spillane v. Missouri Pacific Ry. Co.*, 580.)

4. NEGLIGENCE—PROXIMATE CAUSE.—A cause of action for negligence is not made out without proving that the negligence charged was the proximate cause of the injury. (*Brotherton v. Manhattan Beach Imp. Co.*, 709.)

5. NEGLIGENCE—LIABILITY OF BATHHOUSE KEEPERS.—

Although a patron of a bathing establishment may, by his own negligence, place himself in such a situation that his life is in danger, yet, if the bathhouse keeper, after becoming aware of such fact, fails to take reasonable precautions to avert such danger, he is liable for the resulting injury. (*Brotherton v. Manhattan Beach Imp. Co.*, 709.)

6. NEGLIGENCE—DUTY OF BATHHOUSE KEEPERS.—A company conducting a bathing resort, frequented by thousands of people every month, and letting out its privileges to the public for hire, is bound to exercise ordinary prudence and care for the safety of bathers, and should keep some one on duty to supervise them, and to rescue any one apparently in danger; but whether or not proper precautions have been taken is, ordinarily, a question of fact, which ought to be submitted to a jury. (*Brotherton v. Manhattan Beach Imp. Co.*, 709.)

7. NEGLIGENCE OF BATHHOUSE KEEPER—DIRECTION TO FIND FOR DEFENDANT, WHEN ERRONEOUS.—When a bathhouse keeper is notified of a bather's disappearance so soon thereafter as to justify a reasonable inference that an immediate search in the water would result in rescue before death, and has no one present to attempt the rescue, and fails to make immediate search in the water for the missing bather, it is error, in an action to recover damages on account of the death, to direct the jury to return a verdict for the defendant. (*Brotherton v. Manhattan Beach Imp. Co.*, 709.)

8. NEGLIGENCE IS A QUESTION FOR THE JURY where the facts are disputed, or where, from the undisputed facts, different minds may reasonably draw different conclusions as to the existence of negligence. (*Brotherton v. Manhattan Beach Imp. Co.*, 709.)

See Counties, 1; Railroad Companies, 5, 6, 13; Telegraph Companies, 2, 5; Waters and Watercourses, 3.

NEGOTIABLE INSTRUMENTS

1. NEGOTIABLE INSTRUMENTS—POSSESSION AS BADGE OF OWNERSHIP.—Possession by the payee of a note specially indorsed to him by a third party is prima facie evidence that such payee is the owner of the note. (*Kells v. Northwestern etc. Ins. Co.*, 541.)

2. NEGOTIABLE INSTRUMENTS—EQUITIES AND DEFENSES.—If a negotiable note is transferred after it becomes due, the assignee takes it subject to all equities and defenses as between the maker and payee, but in such case it is only subject, in the hands of the indorsee, to such equities and defenses as are connected with the note itself, and not such as grow out of transactions disconnected therewith. (*Kelly v. Staed*, 648.)

3. NEGOTIABLE INSTRUMENTS—DELIVERY ACCORDING TO PURPOSE.—As a general rule, a negotiable promissory note, like any other written instrument, has no legal inception or valid existence as such until it has been delivered in accordance with the purpose and intention of the parties. (*McCormick etc. Machine Co. v. Faulkner*, 839.)

4. NEGOTIABLE INSTRUMENTS—REISSUE.—If a negotiable note is transferred by the payee, before or after maturity, and is taken up by him, he may reissue it, and, if reissued after due, it is equivalent to drawing a new bill at sight; but if it has been paid by the acceptor or maker at or after maturity, it becomes extinguished, and, if then reissued, the drawer or indorser is not liable on it, even in the hands of a bona fide holder. Being overdue is of itself sufficient notice of its payment. (*Kelly v. Staed*, 648.)

5. NEGOTIABLE INSTRUMENTS—REISSUE OF NOTE SECURED BY TRUST DEED—RIGHTS OF HOLDER.—If an owner conveys land and takes an accommodation note from the grantee secured by deed of trust on the property conveyed, and the grantee subsequently conveys the land and the grantor sells the note, but pays it after maturity, the payee may reissue the note as against himself, and its transfer carries with it such trust deed. The holder of the reissued note is not affected by a release executed by the grantor and the trustee in the trust deed, and a purchaser from such grantor takes subject to the lien of such deed. (*Kelly v. Staed*, 648.)

6. NEGOTIABLE INSTRUMENTS—INVALIDITY OF, WHERE CONDITION HAS NOT BEEN PERFORMED.—If a person delivers his promissory note to another upon the express condition that the instrument shall not become operative as a note until it has been signed by a third person as comaker, no recovery can be had thereon, by the payee, until the condition as to the comaker has been performed. (*McCormick etc. Machine Co. v. Faulkner*, 839.)

7. NEGOTIABLE INSTRUMENTS—EVIDENCE THAT CONDITION HAS NOT BEEN COMPLIED WITH.—Evidence is admissible, in an action on a negotiable promissory note signed by one person only, that the instrument was not to become operative as a note until another person also signed it; and evidence that such condition has not been complied with does not violate the rule that parol evidence is inadmissible to contradict or vary the terms of a written instrument. (*McCormick etc. Machine Co. v. Faulkner*, 839.)

8. PRACTICE—JUDGMENT, ENTRY OF FOR EVASIVE ANSWERS TO INTERROGATORIES.—If a defendant is served with interrogatories in writing requiring him to state whether he was acquainted with the payee of the note sued upon, and whether he had ever signed or executed such note, and, if so, what was its consideration, and whether it was unpaid, to all of which he answered that he does not know, such answer may be stricken out, and a judgment given for the plaintiff on the ground that the answers are evasive, sham, impertinent, and made to conceal, instead of disclosing, the facts within the defendant's knowledge. (*Lowry v. Moore*, 49.)

NEW TRIAL.

See Ejectment, 3.

NOTARY PUBLIC.

See Acknowledgments, 2.

NOTICE.

1. NOTICE.—POSSESSION OF LAND HELD UNDER AN UNRECORDED CONTRACT of purchase is constructive notice to all persons of the rights of such possessor. (*Corey v. Smalley*, 474.)

2. REGISTRY ACTS DO NOT AMOUNT TO ACTUAL NOTICE. The recording of a claim of homestead is not equivalent to actual notice to a mortgagee of such claim, nor does it preclude him from maintaining a second suit to foreclose a mortgage on the homestead on the allegation and proof that he omitted to make the wife a party to the former action because of his ignorance of such claim. (*Brckett v. Banegas*, 164.)

See Cotenancy, 4; Deeds, 7.

NUISANCE.

1. NUISANCE, PUBLIC.—An information may be brought by the attorney-general without the information of a private relator to obtain an injunction against the continuance of a public nuisance con-

sisting of the depositing in a non-navigable stream of substances poisonous to the fish thereof. (*People v. Truckee Lumber Co.*, 183.)

2. NUISANCE MAY ALSO BE A MISDEMEANOR.—The fact that acts are by the Penal Code made misdemeanors and punishable as such does not make them less a nuisance, nor imply that the legislature intended to make the criminal remedy exclusive of the civil. (*People v. Truckee Lumber Co.*, 183.)

3. NUISANCE RENDERING WATERS OF A STREAM POISONOUS TO FISH THEREIN.—To place in the waters of a stream refuse material from a mill, consisting of sawdust, shavings, and other like substances, which are poisonous to fish, is to create a public nuisance. (*People v. Truckee Lumber Co.*, 183.)

4. NUISANCE—MACHINE AND BLACKSMITH SHOP IN A RESIDENCE DISTRICT.—If one purchases ground in a suburban district occupied by costly residences, and proceeds to erect a shop and to carry on a business which causes smoke laden with cinders, soot, and disagreeable odors to penetrate such houses, rendering them unclean, uncomfortable, and, to a material extent, unwholesome, and to a material degree destroying the comfortable, peaceable, and quiet occupation of such houses, he may be enjoined from continuing the disagreeable use of his shops and property. (*McMorran v. Fitzgerald*, 511.)

See Fisheries, 2, 3.

OFFICERS.

1. PUBLIC OFFICERS, WHEN NOT RENDERED INELIGIBLE FOR RE-ELECTION.—A statute making the county clerk one of a board of three members to canvass and declare the result of an election is not void as an attempt on the part of the legislature to make one who is a candidate for re-election a judge in his own case. The powers conferred by statute are ministerial rather than judicial. (*Kindel v. Le Bert*, 234.)

2. PUBLIC OFFICERS—ELIGIBILITY TO RE-ELECTION.—The fact that an election statute makes it the duty of an officer to perform various acts in connection with the election, and gives him general control and supervision thereof, does not render him ineligible as a candidate to succeed himself. (*Kindel v. Le Bert*, 234.)

3. PUBLIC OFFICERS.—A PAYMENT OF SALARY TO AN OFFICER AFTER A JUDGMENT has been rendered in quo warranto ousting him from the office is unauthorized, and constitutes no defense to an action against the municipality for the same salary brought by the person found to be entitled to the office. (*Scott v. Crump*, 478.)

4. PUBLIC OFFICERS.—THE PAYMENT OF THE SALARY OF A PUBLIC OFFICER to one who has been declared to be legally elected to an office releases the municipality paying it from all further obligation to pay such salary, though as a result of quo warranto proceedings another is found to be entitled to the office. This rule remains applicable though the officers of the municipality knew of the pendency of the quo warranto proceeding, and had granted to the possessor of the office the certificate of election under which he held such possession, and which was set aside by the judgment in quo warranto. (*Scott v. Crump*, 478.)

5. OFFICERS—RETIRING COUNTY TREASURER—PAYMENT TO SUCCESSOR—CERTIFICATE OF DEPOSIT.—If a person, going into office as a county treasurer, does not receive county funds, in the form of money or currency, from the retiring officer, but takes in lieu thereof, as payment to him, a certificate of deposit evidencing the deposit of county funds in a bank for safekeeping, and permits the certificate to be canceled and a new one to be issued

payable to himself as county treasurer, leaving the money in the bank, this is a sufficient reception by him of the county money to render him and his sureties liable therefor, and the bank's subsequent failure, during the time of the deposit, and the officer's consequent inability to realize the money, does not relieve him or his bondsmen from such liability. (Bush v. Johnson County, 673.)

6. OFFICERS—LIABILITY OF, FOR PUBLIC FUNDS LOST—NEGLIGENCE.—A public officer and his sureties are answerable for public funds lost, regardless of the question of fault or negligence on the part of the officer, where the law, in positive terms, or from its general tenor, and without any limitation upon the obligation, requires that the officer shall pay over public funds which have been received and held as such; and, if the officer's bond is conditioned for the faithful performance of his duties, his sureties are liable to the same extent as their principal. (Bush v. Johnson County, 673.)

7. OFFICERS—RETIRING COUNTY TREASURER—LIABILITY OF, FOR PUBLIC FUNDS LOST—NEGLIGENCE.—If statutes require, by their general tenor, if not in express terms, a retiring county treasurer to account for, or to pay over, public money in his hands, and the bond of such officer is conditioned for the faithful discharge of his duties, and for the faithful accounting for, and paying over of, all county money received by him, both he and his sureties are liable for any failure on his part to pay over any of the public money, notwithstanding it may have been lost without his fault or negligence. (Bush v. Johnson County, 673.)

8. OFFICERS—RETIRING COUNTY TREASURER—DUTY AND LIABILITY OF BONDSMEN—DEFENSE BY SURETIES.—It is the duty of the bondsmen of a county treasurer to see that the duties of that officer are faithfully discharged. Hence, if that official, upon retiring from office, fails to turn over public money which he should turn over, and an action is brought therefor, his bondsmen cannot avail themselves of a defense that the board of county commissioners examined the accounts or report of the treasurer, and had what is denominated a "settlement" with him, or that they were negligent or careless in making such settlement. (Bush v. Johnson County, 673.)

9. OFFICERS—COUNTY TREASURER—PAYMENT TO SUCCESSOR—WORTHLESS CERTIFICATE OF DEPOSIT—SETTLEMENT—FAILURE TO TURN OVER PUBLIC FUNDS—LIABILITY.—If a county treasurer, during his first term, holds a certificate of deposit on a bank for six thousand dollars, of public funds, and at the close of his first term and the beginning of the second, makes a report to, and has a settlement with, the county commissioners, but counts such certificate as so much cash, although the bank has failed, and the commissioners have no knowledge of the existence of the certificate, nor of the deposit of the money, such settlement is not binding on the county as an acceptance or approval of the certificate as so much cash accounted for, because there is a mistake in the settlement, and there is a failure to pay over public funds, for which the treasurer and his first term bondsmen are answerable, as the retention of the certificate by the treasurer, or turning it over to himself, as his own successor, do not constitute a paying over of the public funds. (Bush v. Johnson County, 673.)

10. OFFICERS—COUNTY TREASURER AND COMMISSIONERS—SETTLEMENTS BETWEEN—CONCLUSIVENESS OF.—The periodical settlements required, by the statutes of Nebraska, to be made between the county board of commissioners and the county treasurer, do not have in them the elements of a judicial determination of the subjects involved. (Bush v. Johnson County, 673.)

11. BONDS—INDEMNITY AGAINST BREACH OF DUTY.—A bond indemnifying a sheriff or other officer against loss for omitting

to do that which it is his duty to do, as to execute final process, is void as against public policy, and no recovery can be had thereon. (*Harrington v. Crawford*, 653.)

See Contracts, 3; Municipal Corporations, 8.

ORDER OF PROOF.

See Appeal, 3.

PARTIES.

PARTIES—NOTICE OF SUIT.—The mere fact that one has notice of the pendency of a foreclosure suit does not make him a party thereto, or make the decree binding upon him. (*Cram v. Cottrell*, 714.)

See Attachment, 2.

PARTITION.

1. PARTITION.—DUTY OF THE COURT TO DETERMINE THE INTERESTS OF THE PARTIES.—As a general rule all the parties to a suit in partition are actors, each having the right to set up in his pleadings the nature and extent of his interest, and to have the same ascertained and adjudicated by the interlocutory decree. This rule applies where the property must be sold for partition as well as in other cases, and a decree which does not adjudicate the interests of the respective parties is ordinarily erroneous. (*Grant v. Murphy*, 188.)

2. PARTITION—CONFLICT OF JURISDICTION WITH THE PROBATE COURT, HOW MAY BE AVOIDED.—If a cotenant dies, and a suit is subsequently commenced by another cotenant for the partition of the property by a sale thereof, and the question of who are the heirs or devisees of the decedent has not been determined by the court of probate, which alone has jurisdiction of such question, the court may proceed to make partition by determining what is the interest of the decedent, and finding that such interest belongs to those who are entitled to the real estate of which he died seised, leaving the probate court to determine who are such persons and what are their respective interests. (*Grant v. Murphy*, 188.)

3. PARTITION PENDING PROBATE PROCEEDINGS.—If one of several cotenants dies, the others remain entitled to the partition of the property, and are not obliged to refrain from prosecuting proceedings therefor until the estate of the decedent cotenant has been settled in a court of probate and his share of the property distributed by it to the persons found entitled thereto. At least, this is the law where the property is such that partition of it must be accomplished by its sale. (*Grant v. Murphy*, 188.)

PARTNERSHIP.

1. PARTNER'S INTEREST IN REAL PROPERTY—RIGHT OF CREDITOR TO FOLLOW.—A creditor of a partnership has the right to attach the interest of one of the partners in its real property in the hands of a fraudulent vendee thereof. (*Michigan Trust Co. v. Chapin*, 490.)

2. PARTNERSHIP—LIABILITY FOR TORTS OF ONE PARTNER.—Each partner being an agent of the firm, the firm is liable for his torts committed within the scope of his agency, although ignorant of his acts. (*Hobbs v. Chicago Packing etc. Co.*, 320.)

3. A HOMESTEAD INTEREST CANNOT BE ACQUIRED IN REAL PROPERTY CONSTITUTING PART OF THE ASSETS OF A PARTNERSHIP AS AGAINST THE CREDITORS THEREOF. (*Michigan Trust Co. v. Chapin*, 490.)

4. TROVER AND CONVERSION—PARTNERSHIP.—If the wrongful delivery of the goods of a third person, while in the custody of a partnership, is an act done within the scope of a partnership business, it, though made by a single member of the firm without the knowledge or consent of the other members of the firm, renders all of the copartners or the firm liable in trover for a conversion of the goods. (*Hobbs v. Chicago Packing etc. Co.*, 320.)

5. TROVER AND CONVERSION—PARTNERSHIP.—If an owner of goods ships them upon a bill of lading whereby they are consigned to his own order, at the same time drawing in favor of a banking partnership "for collection" a draft upon the person to whom the goods are intended to be delivered upon payment of the draft, and also attaching to the draft the bill of lading, so indorsed as to give the partnership control of the possession of the goods, a delivery to them by this firm to the drawee of the draft without requiring its payment, is, as against the owner, a conversion subjecting the firm to an action of trover. This rule is not rendered inapplicable by the fact that the owner, not knowing that the goods had been delivered, agreed to make a like shipment of other goods on condition that the partnership would guarantee the payment of the former draft within a certain time, it appearing that this agreement was simply to expedite the delivery of the goods first shipped and the collection of their price. (*Hobbs v. Chicago Packing etc. Co.*, 320.)

See Husband and Wife, 9-11.

PARTY WALLS.

PARTY WALLS—INCREASE OF HEIGHT—INJUNCTION. If a party wall is, by joint agreement between adjacent owners, erected to the height of three stories, thereby constituting the parties joint owners of the wall to the height of three stories, each party has, in the building of the other, a cross-easement which he is entitled to have protected. Hence, one of the parties may be restrained, by injunction, from a threatened trespass in putting up a fourth story, in his own right, for his own benefit, and in open hostility to the wishes of the other, especially where the height of the wall, owing to its insufficient thickness at the base, cannot be increased without danger of serious injury to the property of the other adjacent owner. (*Calmelet v. Sichel*, 700.)

PAYMENT.

See Limitations of Actions, 1-3.

PLEADING.

1. PLEADING.—THE PROBATIVE FACTS requisite to prove ultimate facts are matters of evidence, and need not be set out in the complaint. (*Gude v. Dakota Fire etc. Ins. Co.*, 860.)

2. PLEADINGS.—CROSS-BILLS ordinarily grow out of matters alleged in an original bill or complaint, and are used to bring the whole dispute before the court, and usually raising new issues which may present matters arising between codefendants but which are not shown by the original bill or complaint. (*Jewett v. Iowa Land Co.*, 555.)

3. IN PLEADING THE STATUTE LAW OF ANOTHER STATE, it is not sufficient to allege that the laws of such state are of a certain effect, or that by them certain things are required, but the statute intended to be relied upon should be pleaded as would any other fact, not by stating what in the opinion of the pleader is its effect, but the statute itself should be set forth. (*Lowry v. Moore*, 49.)

4. PRACTICE—AMENDED COMPLAINT.—Though the original complaint may, for some purposes, be deemed a part of the record, nevertheless the plaintiff cannot avail himself of the allegations contained therein but omitted from his amended complaint. (*Sengfelder v. Hill*, 36.)

5. PRACTICE—DEMURRER FOR MISJOINDER, FORM OF.—A demurrer stating that the defendant interposing it and the other defendant named therein are improperly joined as parties defendant is sufficient to raise the question of their misjoinder. It is not necessary to state why the pleader conceives their joinder to be improper. (*Gardner v. Samuels*, 135.)

6. PRACTICE.—A DEMURRER FOR MISJOINDER OF PARTIES DEFENDANT CANNOT BE SUSTAINED when interposed by a defendant who is a proper party to the action and against whom the complaint states a sufficient cause, though it does not disclose a cause of action against the other defendant. It is only when the complaint states some ground of relief against each defendant, and the claims against them are improperly joined in one suit, that each has a right to demur on the ground that the other is improperly joined with him. (*Gardner v. Samuels*, 135.)

7. PLEADING—NONJOINDER—DEFECTIVE ANSWER.—An answer setting up a nonjoinder of parties plaintiff is defective if it does not show that the omitted party or parties were living at the time the complaint was filed. (*Deegan v. Deegan*, 742.)

8. PLEADING—NONJOINDER—DEMURRER.—An objection of nonjoinder of parties plaintiff cannot be taken by demurrer, unless the complaint affirmatively shows that the party for whose nonjoinder the demurrer is interposed was living when the suit was commenced. If the fact does not appear upon the face of the complaint, the objection must be taken by answer. (*Deegan v. Deegan*, 742.)

9. PLEADING—NO MISJOINDER OF CAUSES OF ACTION.—In an action by a county, against the children of an indigent and helpless father, to recover money advanced for his support, there is no misjoinder of causes of action because a judgment is asked requiring the defendants to contribute to his future support, if the complaint states no cause of action for future maintenance. (*McCook County v. Kammos*, 854.)

10. PLEADING.—A DEMURRER TO A COMPLAINT is properly overruled if it contains one good cause of action. (*McCook County v. Kammos*, 854.)

11. PLEADING—DEFECTIVE ALLEGATIONS—WAIVER BY GENERAL DEMURRER.—A defective allegation in a complaint averring the breach of a guardian's bond on which an action is brought is waived by a general demurrer. (*Deegan v. Deegan*, 742.)

See *Cloud on Title*, 2; *Elections*, 15, 16; *Husband and Wife*, 13; *Judgment*, 12 *Mechanic's Lien*, 6, 9; *Railroad Companies*, 14.

PLEDGE.

See *Carriers*, 13; *Insurance*, 19.

POLICE POWER.

See *Interstate Commerce*; *Game Laws*, 1; *Statutes*.

POOR AND POOR LAWS.

POOR LAWS—CONSTRUCTION OF STATUTE IMPOSING LIABILITY ON CHILDREN TO SUPPORT POOR PARENTS.—If a statute imposes the duty upon "the children of any poor person, who is unable to maintain himself by work, to maintain such person to the extent of their ability," a county which has, under the di-

rection of the law, furnished necessities to an indigent and helpless father, may recover therefor in an action against the children whose duty it was to furnish the same, and whose neglect or refusal so to do made it necessary for the county to furnish such necessities; but a court would have no authority to render a judgment requiring the defendants to undertake the future support of their father where the statute is silent as to the means of enforcing such duty as to future maintenance. (*McCook County v. Kammoss*, 854.)

PREScription.

See Cotenancy 2, 5.

PROBATE COURTS.

See Courts, 1, 2; Judgment, 4, 5; Partition, 2, 2.

PROCESS.

1. PROCESS—CITATION—SUMMONS—APPEARANCE.—The purpose of serving a citation, like the object of a summons, is to bring the party into court. If he voluntarily appears without it, such service is unnecessary. (*Deegan v. Deegan*, 742.)

2. PROCESS.—AN ORDER FOR THE PUBLICATION OF A SUMMONS must follow the issuance of the summons and not precede it. (*Coffin v. Bell*, 738.)

3. PROCESS.—IF CONSTRUCTIVE SERVICE OF SUMMONS is relied upon to sustain a judgment, there must have been a strict compliance with the provisions of the statute, this being necessary to obtain jurisdiction over the defendant. (*Coffin v. Bell*, 738.)

4. PROCESS—SECOND SERVICE OF SUMMONS.—If the first service of a summons is a nullity, the fact that the summons has been returned and filed does preclude another and perfect service of it, as the summons may be withdrawn and properly served. (*Coffin v. Bell*, 738.)

5. PROCESS—CONSTRUCTIVE SERVICE.—If a nonresident party is served with summons by publication, plaintiff need not show that such party actually received the summons mailed to him in order to obtain judgment on such service. (*Hunter v. Ruff*, 907.)

6. PROCESS.—ABUSE OF PROCESS is the malicious perversion of a regularly issued process to accomplish some purpose whereby a result not lawfully nor properly attainable under it is secured. (*Nix v. Goodhill*, 434.)

See Attachment, 6, 7; Corporations, 18, 19; Judgment, 2, 6, 7, 9; Malicious Prosecution, 4; Witnesses, 1, 2.

PUNISHMENT.

See Criminal Law, 3, 4.

QUO WARRANTO.

QUO WARRANTO—JURY TRIAL.—In proceedings in quo warranto, the defendant is not entitled to a trial by jury, though the constitution provides that the right to trial by jury shall remain inviolate if, before its adoption, such right did not extend to such proceedings. At the common law, right to trial by jury did not extend to proceedings in quo warranto. (*State v. Doherty*, 89.)

See Officers, 3, 4.

RAILROAD COMPANIES.

1. AN ASSESSMENT FOR STREET IMPROVEMENTS AGAINST THE TRACK AND RIGHT OF WAY OF A RAILWAY

corporation cannot be sustained. (Detroit etc. Ry. Co. v. Grand Rapids, 466.)

2. ASSESSMENT FOR STREET IMPROVEMENTS.—RAILWAY PROPERTY necessary for the exercise of its franchise cannot be sold for a street improvement. (Detroit etc. Ry. Co. v. Grand Rapids, 466.)

3. RAILROADS—REASONABLE TIME FOR REMOVAL OF BAGGAGE.—If a passenger on a railway train does not reach his destination until 11 o'clock P. M., and leaves his baggage at the depot, without making any demand for it during the night of its arrival, the lateness of the hour of arrival, and the fact that there are no vehicles at the depot, or "running" at the time, by which the baggage may be removed, is not a sufficient excuse to extend the reasonable time within which the passenger must call for the baggage until the following morning. (Kansas City etc. Ry. Co. v. McGahey, 111.)

4. NEGLIGENCE — CONTRACT AGAINST — INTERSTATE SHIPMENT.—A statute which prohibits contracts exempting transportation companies from liability for negligence, applies to an interstate shipment. Hence, if one in charge of a shipment of cattle from one state to another, is injured by the negligence of a railroad company, he may recover such an amount as will compensate him for the injury sustained, although the contract of shipment limits the liability for such injury to a smaller amount. (Solon v. Chicago etc. Ry. Co., 430.)

5. NEGLIGENCE—CARE REQUIRED OF INFANT—DUTY TO LOOK AND LISTEN.—If it is shown that an infant is old enough to know the danger of going upon railroad tracks, and that he is intelligent and conversant with the management of trains thereon, he must look and listen for trains, and seek to avoid danger by getting off the tracks, and his failure to do so is contributory negligence. (Spillane v. Missouri Pacific Ry. Co., 580.)

6. NEGLIGENCE OF INFANT.—If the proof shows that an intelligent boy, nine years of age, familiar with the locality and the movements of trains, is injured while standing near a railroad track as a train passes, having one end of a string tied to his wrist and the other to a piece of ice on the opposite side of the track, and that the injury is caused by the locomotive striking the string and throwing the boy against the train, he is guilty of contributory negligence, and cannot recover for his injury so received. (Spillane v. Missouri Pacific Ry. Co., 580.)

7. RAILROADS—LIABILITY FOR FAILURE TO GIVE SIGNALS — NEGLIGENCE — PROXIMATE OR EFFICIENT CAUSE.—Under a statute providing that, if the failure of a railroad company to give prescribed signals at crossings shall contribute to a personal injury, the company shall be liable therefor unless the party injured was guilty of gross negligence, it is not necessary to prove that the negligence of the company was the "proximate" or "efficient" cause of such injury in order to recover, when no gross negligence on the part of the party injured is charged. (Wragge v. S. Carolina etc. R. R. Co., 370.)

8. CONSTITUTIONAL LAW—LEASING OF RAILWAYS.—A constitutional provision that the legislature shall not pass any law permitting the leasing or alienation of any franchise so as to relieve the franchise or property held thereunder from the liability of the lessor or grantor contracted or incurred in the operation, use, or enjoyment of such franchise is a restriction upon the power of the legislature, and prevents a corporation possessing a franchise from saving it harmless from any liability by conveying it to some other corporation, but it does not create a personal liability against a corporation where none existed before. (Lee v. Southern Pac. R. R. Co., 140.)

9. RAILWAYS, LEASE BY, WHEN DOES NOT RELIEVE FROM LIABILITY.—A lease of a railway, though authorized by statute, does not relieve the lessor from liability for any injury resulting from the negligent omission of a duty owed by it to the public, such as the proper construction of its road, stationhouses, etc., unless such statute expressly exempts it from liability. (*Lee v. Southern Pac. R. R. Co.*, 140.)

10. RAILWAY, LEASE OF WITHOUT AUTHORITY.—A railway lease of its road made without statutory authority is void, and the lessee, if it operates the road, must be deemed to do so as the agent of the lessor. (*Lee v. Southern Pac. R. R. Co.*, 140.)

11. RAILWAYS—LIABILITY OF LESSOR TO EMPLOYÉES OF LESSEE.—A railway corporation leasing its road to another corporation, by which it is subsequently operated, is not liable to an employe of the lessee corporation for injuries sustained by him through the negligence of his employer or of the latter's servants or agents. (*Lee v. Southern Pac. R. R. Co.*, 140.)

12. RAILWAYS—LIABILITY OF LESSOR TO EMPLOYÉES OF LESSEE.—If a brakeman in the employment of a lessee railway corporation is injured through negligence of the lessor corporation in improperly constructing its railway and track, and such defectively constructed track remains out of repair, inadequate, and unsafe, he may recover of the lessor for the injuries so sustained by him. (*Lee v. Southern Pac. R. R. Co.*, 140.)

13. NEGLIGENCE—EVIDENCE.—In an action to recover for an injury received several hundred feet from a railroad crossing, a municipal ordinance requiring a railroad company to station a watchman at crossings to protect persons about to cross is not admissible in evidence to show negligence on the part of the railroad company. (*Spillane v. Missouri Ry. Co.*, 580.)

14. PLEADING, VARIANCE, WHEN IMMATERIAL.—If the plaintiff avers himself to have been an employe of the defendant corporation at the time he received certain injuries through its negligence in the construction and maintenance of its track, he may recover though he was not such employe, but was an employe of another corporation operating the road under a lease from the defendant, if the negligence was of a character for which he was entitled to recover, though not as an employe of the defendant. The averment of the employment may be eliminated from the complaint and still leave therein facts sufficient to warrant a recovery against the defendant. (*Lee v. Southern Pac. R. R. Co.*, 140.)

15. CORPORATIONS—RAILROADS—RESIDENCE.—A railroad company is a resident of the county or counties wherein its lines are located and in which it maintains a public office for the transaction of business, and an agent upon whom process may be served, within the meaning of a statute providing that an action to recover for an injury to personal property shall be tried in the county in which the defendant resides at the time of the commencement of the action. (*Tobin v. Chester etc. R. R. Co.*, 890.)

See Carriers; Justice of the Peace, 2.

RAPE.

RAPE—CARNAL ABUSE OF FEMALE UNDER AGE OF CONSENT—ACCOMPLICE.—The rule requiring the testimony of an accomplice to be corroborated does not apply in a prosecution for the crime of carnally abusing a female person under the age of consent, because she is not an accomplice. Hence, a defendant, in such a case, may be convicted of that crime upon the uncorroborated testimony of the prosecutrix. (*Bond v. State*, 129.)

RECEIVERS.

1. RECEIVER.—IN AN ACTION TO RECOVER THE POSSESSION OF REAL PROPERTY to which the title is disputed and of which both parties claim to be owners in fee, a receiver will not be appointed to take possession of the property from the defendant or to receive the rents and profits thereof. (*Sengfelder v. Hill*, 36.)

2. RECEIVERS—FOREIGN—ACTIONS BY.—A receiver appointed by a court of the republic of Mexico, may, as against an attaching creditor of the debtor, who resides in one of the states of the United States, recover, by a suit in another state, the property of the debtor which has come into the possession of the receiver in the place of his appointment and which he has brought within the jurisdiction of the court where the action of replevin is brought. (*Robertson v. Staed*, 569.)

3. RECEIVERS—FOREIGN—ACTIONS BY—BURDEN OF PROOF.—If a receiver claims a right to the possession of property in one jurisdiction solely, by virtue of the judgment of a foreign court, appointing him such receiver, the burden of proof is on him to show that that court had jurisdiction to confer such right upon him. (*Robertson v. Staed*, 569.)

REMAINDERMEN.

See Estates, 3.

REPLEVIN.

See Justice of the Peace, 4, 5.

RESCISSION.

See Corporations, 9, 10.

REVERSION.

See Corporations, 3.

RULES OF COURT.

See Appeal, 4.

SALES.

1. SALES—BREACH OF WARRANTY.—THE MEASURE OF DAMAGES in an action for breach of warranty on the sale of a chattel is the difference between the actual value of the article sold and its value if it had been as warranted, and this is not affected by proof that the purchaser subsequently resold it, at an increased price, especially if it does not appear that such sale by him was without warranty. (*Berry v. Shannon*, 313.)

2. SALES—BREACH OF WARRANTY—ABATEMENT IN PRICE.—In an action to recover the agreed price of an animal warranted to be serviceable for a particular purpose, and found to be of no value for that purpose, the purchaser is entitled to an abatement of the purchase price equal to the difference between the agreed price and the actual value as reduced by the defective quality of the animal; and this is true whether in disposing of the animal to a third person the first purchaser loses anything or not, for what he realizes is of no consequence except as it may tend to illustrate the question of value. (*Berry v. Shannon*, 313.)

3. SALES—CONTRACT CONSTRUED TO BE ONE OF SALE AND NOT OF AGENCY.—Language, in an agreement between a manufacturing company and a merchant, making him the agent of the company to sell its tobacco at such prices as it may direct, and

providing that he is to be paid a certain commission on all sales made by him at the price fixed by the company, but that if he sells for less he is to have no commission, is not controlling, where the agreement requires a warranty that the merchant shall pay for all tobacco received by him from the company, and further provides that he is to execute and deliver his promissory notes, due in sixty days, for all tobacco furnished to him by the manufacturer. Such a contract is one of sale, and not a contract of agency for the sale of the manufacturer's goods, by the merchant, on commission, and tobacco furnished to him, under it, is his property, when he gives his notes in payment therefor. (*Mack v. Drummond Tobacco Co.*, 691.)

SCANDALOUS PUBLICATIONS.

See Indictment, 2; Statutes, 6.

SLANDER.

See Banks and Banking.

STATE.

See Corporations, 17; Fisheries, 5, 6; Game Laws, 1; Insurance, 32.

STATUTE OF LIMITATIONS.

See Limitations of Actions.

STATUTES.

1. **CONSTITUTIONAL LAW—RETROACTIVE STATUTES, WHEN VALID.**—A retroactive statute is valid only when it is remedial, and does not impair contracts or divest vested rights. Whenever a statute so far alters a remedy as to impair, destroy, change, or render the right scarcely worth pursuing, it necessarily impairs the obligation of the contract upon which such right is founded, and must be denied effect. (*Teralta Land etc. Co. v. Shaffer*, 194.)

2. **CONSTITUTIONAL LAW—STATUTE MODIFYING RIGHT OF REDEMPTION.**—If a sale has been made for delinquent taxes under a statute allowing the owner of property to redeem it within a time specified, the legislature cannot amend the law so as to impose new and more onerous conditions upon the exercise of the right of redemption. (*Teralta Land etc. Co. v. Shaffer*, 194.)

3. **CONSTITUTIONAL LAW—CONSTRUCTION.**—If a clause is taken from the constitution or statute of another state, it is deemed to have the meaning given by the courts of that state. (*Laporte v. Gamewell Fire Alarm Tel. Co.*, 359.)

4. **STATUTES PROHIBITING SALE OF DRUGS BY ITINERANTS, WITHOUT A LICENSE, WHEN VIOLATED.**—A state statute imposing a license fee of one hundred dollars per annum upon itinerant vendors of drugs or nostrums, who, by writings, or other method, publicly profess to cure or treat disease by any drug or nostrum, and prescribing a penalty, is violated where a local agent, without a license, receives an original package of medicine, shipped to him by his principal from another state, and distributes circulars issued by the principal, representing the medicine to be a cure for certain diseases, and states that the medicine sold by him is as represented in the circulars, although he does not claim to be a physician, or assume to determine the ailments of the people. Hence, as such license fee is not excessive, and the regulations reasonable, a conviction will be sustained. (*State v. Wheelock*, 442.)

5. **CONSTITUTIONAL LAW—CRIMINAL USE OF UNITED STATES MAIL.**—A statute prohibiting creditors or others from threatening to injure the credit or reputation of a debtor by publish-

ing his name as a bad debtor by means of letters or circulars, or by threatening to advertise a claim against him for sale, is not unconstitutional as depriving such creditors of the protection of their property rights, nor as restricting the freedom of speech or publication. (State v. McCabe, 589.)

6. CONSTITUTIONAL LAW—SCANDALOUS PUBLICATIONS. A statute declaring it a felony for one to engage in editing, publishing, or disseminating a paper devoted mainly to the publication of scandals, immoral conduct, or immoral assignations is not unconstitutional as impairing the freedom of speech or the liberty of the press. (State v. Van Wye, 627.)

See Cloud on Title, 1; Corporations, 12, 13; Criminal Law, 1; Electment, 3; Game Laws, 2; Husband and Wife, 1, 2; Insurance, 29-31; Interest, 2; Interstate Commerce; Mandamus, 1, 2; Mechanic's Lien, 5, 8; Municipal Corporations, 5; Officers, 1, 2, 7; Pleading 3; Poor and Poor Laws; Taxes, 9, 10; Witnesses, 2.

SUNDAY NEWSPAPER.

See Taxes, 7.

SURETYSHIP.

1. SURETYSHIP—OMISSION OF NAME OF SURETY FROM BOND.—The fact that the name of a surety who signs and seals a bond is not mentioned therein, does not affect its validity, if it is apparent from the face of the bond that he intended to be bound by its conditions. (Wheeler v. Paterson, 527.)

2. SURETIES AND INDORSERS ARE NOT RELEASED by the failure of the creditor to enforce a mortgage or other lien which he has taken to secure the payment of his debt. (Carver v. Steele, 156.)

3. MORTGAGE ACTION AGAINST SURETIES OR INDORSERS WITHOUT FORECLOSURE.—Though a statute declares that there shall be but one action for the recovery of a debt secured by a mortgage, in which action the security shall first be exhausted, it does not prevent the maintenance of an action by the mortgagee against the sureties or indorsers of the mortgagor, because their promise is not secured by the mortgage. (Carver v. Steele, 156.)

See Guardian and Ward, 3, 4; Justice of the Peace, 4, 5.

TAXES.

1. TAXATION—SITUS OF PROPERTY HELD BY EXECUTORS OR TRUSTEES.—Upon the death of the owner of personal property, leaving a will and appointing executors, who by the duties imposed upon them are really made trustees of his estate, the situs of such personal property, for the purposes of taxation, is at the domicile of such executors, and not in that of the decedent at the time of his death. (Walla Walla v. Moore, 31.)

2. TAX SALES EN MASSE.—A tax sale and deed may include several distinct lots assessed to the same person and adjoining one another. (Crisman v. Johnson, 224.)

3. A TAX DEED OF SEPARATE, NONCONTIGUOUS TRACTS of land, sold en masse, is void. (Emerson v. Shannon, 232.)

4. TAX DEEDS, WHEN NOT VOID AS SHOWING SALES EN MASSE OF NONCONTIGUOUS LOTS.—If a tax deed recites the sale of a number of lots not numbered consecutively, this is not sufficient to overcome the presumption in favor of the deed and the regularity of the proceedings, for, notwithstanding the mode of numbering, the lots may be contiguous and their sale altogether authorized. (Crisman v. Johnson, 224.)

5. TAX SALES MADE AT AN UNAUTHORIZED PLACE.—If it appears by a tax deed that the sale took place at the office of the county clerk when the statute requires it to be at the office of the county treasurer, such deed is void. (*Crisman v. Johnson*, 224.)

6. A TAX SALE MADE AT A TIME OR PLACE OTHER THAN THAT prescribed by law is void. (*Bennett v. North Colo. Springs etc. Co.*, 281.)

7. TAX SALES—SUNDAY PAPER, NOTICE PUBLISHED IN. A publication of a notice of a tax sale is in the nature of the service of process, and, if it takes place in a Sunday edition of a newspaper, is void. (*Schwed v. Hartwitz*, 221.)

8. TAX DEED.—A NOTICE OF SALE IS NOT INDISPENS- ABLE to the exercise of the power to sell land for delinquent taxes, and the legislature may, therefore, provide that the omission to give such notice shall not affect the validity of the sale. (*Crisman v. Johnson*, 224.)

9. TAX DEEDS—STATUTES LIMITING TIME WITHIN WHICH TO ASSAIL.—A statute providing that no action for the recovery of land sold for taxes shall lie unless the same be brought within five years after the execution and delivery of the deed therefor is constitutional, and prevents the recovery of lands held by the defendant under a tax deed, on the ground that there was no notice of sale and that the lands were improperly sold en masse. (*Crisman v. Johnson*, 224.)

10. TAX SALES, OBJECTIONS WHICH MAY BE REMOVED BY STATUTE.—All questions with reference to tax proceedings, except such as go to the power and jurisdiction of the taxing officers and the fraud and misconduct of the parties, may be barred by statute, as where the statute makes tax deeds conclusive evidence of the regularity of the proceedings. (*Crisman v. Johnson*, 224.)

11. CONSTITUTIONAL LAW—POLL TAX, EXACTING FOR NOT VOTING.—A provision in a city charter requiring the levy of a poll tax for sanitary purposes in years of general election on every male resident, except such as vote at such election, is a discrimination between subjects in the same class, and is unconstitutional, under a constitution providing that taxes "shall be uniform upon the same class of subjects within the territorial limit of the authority levying the tax." (*Kansas City v. Whipple*, 657.)

See Cloud on Title, 1.4; Cotenancy.

TELEGRAPH COMPANIES.

1. TELEGRAPH COMPANIES MUST PROVIDE COMPETENT SERVANTS and suitable instruments and respond in damages for their negligence or the negligence of their servants. (*Reed v. Western Union Tel. Co.*, 609.)

2. TELEGRAPH COMPANIES—NEGLIGENCE—BURDEN OF PROOF.—Proof that a telegraphic message was not transmitted as it was delivered to the company, and that it was acted upon as received by the sendee, establishes a prima facie case of negligence against the company, and casts the burden of proof upon it to disprove such negligence. (*Reed v. Western Union Tel. Co.*, 609.)

3. TELEGRAPH COMPANIES CANNOT BY CONTRACT EX- EMPT THEMSELVES from liability for their negligence, either ordinary or gross, or that of their servants, in the transmission of messages. (*Reed v. Western Union Tel. Co.*, 609.)

4. TELEGRAPH COMPANIES—CONFLICT OF LAWS.—If a telegraphic message is delivered to the company in one state, to be by it transmitted to a place in another state, the validity and interpretation of its contract, as well as its liability thereunder, is to be

determined by the law of the former state. (*Reed v. Western Union Tel. Co.*, 609.)

5. TELEGRAPH COMPANIES—NEGLIGENCE—MEASURE OF DAMAGES.—If a land agent leaves a message with a telegraph company directed to his principal and naming the price at which his property can be sold, and the company, through error in the transmission of the message, raises the price named therein, and the principal accepts the offer as received, and executes a deed at that price, while the agent is compelled to conclude the contract of sale at the price first named by him, the telegraph company is liable to the vendor for the difference in price as named in the message as received by it and the raised price as named in the message as delivered to the vendor. (*Reed v. Western Union Tel. Co.*, 609.)

TRIAL.

1. JURY TRIAL, WHEN GUARANTEED BY THE CONSTITUTION.—A constitutional provision declaring that the right of trial by jury shall remain inviolate guarantees only the right of trial by jury as it existed at the adoption of the constitution. (*State v. Doherty*, 39.)

2. TRIAL.—WHEN VERDICT MAY BE DIRECTED.—If the evidence leaves the facts undisputed, and different conclusions or inferences are not deducible therefrom, the court should declare their legal effect. Hence, if only one conclusion or inference can be reasonably drawn, the court commits no error in directing a verdict. (*McCormick etc. Machine Co. v. Faulkner*, 839.)

3. JURORS—COMPETENCY.—On a trial under an indictment for circulating a scandalous newspaper, a juror, who on his voir dire states that he has an opinion that such newspaper ought to be suppressed, but that he has no opinion as to the guilt or innocence of the defendant, that he has never read a copy of such paper, that his opinion is formed wholly from public talk, and that he can give an impartial verdict, is competent as a juror. (*State v. Van Wye*, 627.)

4. VERDICT—ASSESSMENT OF PUNISHMENT.—If a verdict finds the accused guilty of the offense charged, and assesses his punishment "at two (2) in the penitentiary," the verdict, though defective is good as a general one of guilty, and the court is authorized to fix the punishment. (*State v. Van Wye*, 627.)

See Appeal; Equity, 2.

TROVER.

1. TROVER—CONVERSION BY AGENT.—An agent who takes the property of another without his consent, and delivers it to his principal, is guilty of a conversion and is liable in trover for the recovery of the property, or in damages, although he may have acted in ignorance of the true owner's title, and in perfect good faith. (*Miller v. Wilson*, 319.)

2. TROVER—CONVERSION—DEMAND.—If an actual conversion is shown, no demand is necessary before bringing an action of trover to recover the property. (*Miller v. Wilson*, 319.)

3. TROVER AND CONVERSION.—A WRONGFUL delivery of goods, either negligently or willfully made, by one who has been entrusted with their custody, constitutes a conversion by the latter. (*Hobbs v. Chicago Packing etc. Co.*, 320.)

See Cotenancy, 1; Partnership, 4, 5.

TRUST DEEDS.

See Trusts, 2, 3.

TRUSTS.

1. TRUST. WHEN VESTS TITLE IN BENEFICIARIES.—A grant to trustees in fee simple for the use or benefit of persons named therein vests the fee in such beneficiaries. (*Wilson v. Leary*, 778.)

2. TRUST DEED, RIGHT TO CONTROL ORDER OF SALE UNDER.—One who purchased land at a trustee's sale, but subject to another and prior deed of trust, and who subsequently purchased the indebtedness secured by such prior deed and caused the lands conveyed thereby to be advertised for sale thereunder, such deed including two parcels, has no right to have the trustee first sell the lot which had not been sold at the prior sale. The trustee may, in his discretion, first sell the lot which had been sold under the subsequent trust deed, and the person bidding it in obtains a perfect title, irrespective of the smallness of his bid, there being no suggestion of fraud in the transaction. (*Hinton v. Pritchard*, 768.)

3. A TRUSTEE IN A DEED MADE FOR THE PURPOSE OF SECURING INDEBTEDNESS due from the grantor to a third person is the agent both of the debtor and the creditor and required to discharge his duties with strict impartiality, and not for the purpose of oppressing either. If the deed includes two or more parcels of land, the trustee has a discretion to determine which he will first offer for sale, and may therefore determine to first sell a parcel which has already been sold under a subsequent deed of trust. (*Hinton v. Pritchard*, 768.)

See Courts, 2.

UNITED STATES MAILS.

See Criminal Law, 5, 6.

VARIANCE.

See Railroad Companies, 14.

VENDOR AND PURCHASER.

VENDOR AND PURCHASER—PAYMENTS MADE AFTER THE LEVY OF AN ATTACHMENT.—One who has purchased land and taken possession thereof under a written contract is not charged with notice of writs subsequently levied upon the interest of his vendor, and is therefore protected against such levies in all payments subsequently made under his contract and without actual notice of the attachment or execution against his vendor, and a conveyance to him by his vendor as the result of such payments is not subject to the levy of such writs. (*Corey v. Smalley*, 474.)

VERDICT.

See Appeal, 2; Indictment, 1; Trial, 4.

WAIVER.

See Appeal, 9; Insurance, 3.4; Mechanic's Lien, 2.

WATERS AND WATERCOURSES.

1. WATERS—SURFACE—RIGHT TO DRAIN—LIABILITY FOR OVERFLOW.—An upper proprietor, while he cannot divert surface water on his land from its natural course to the unnecessary injury of his adjoining owner, may aid the natural and only possible system of drainage by deepening the natural outlet for such water, if this is absolutely necessary in the interests of good husbandry and the reasonable improvement of his lands, and does not inflict

unnecessary injury upon the lower proprietor and, although the effect of such act is to cause more water to flow upon the land of the latter than otherwise would, he is not entitled to an injunction to restrain the act of the upper proprietor, nor to recover damages for a usual or unusual overflow of his lands caused by ordinary or extraordinary rainfall, unless he can show that the deepening of the natural waterway was the efficient and proximate cause thereof. This is especially true when it appears that the benefit derived from the deepening of such outlet is very great as compared with any injury likely to result therefrom, and there is nothing to indicate that the lower owner cannot readily protect himself against such injury. (*Gillilan v. Schmidt*, 515.)

2. WATERS—RIGHT TO DISCHARGE SURFACE WATER—WHO ARE ANSWERABLE.—Surface water is a common enemy, and an owner may discharge it upon the land of another, without being answerable for incidental injury inflicted by his act. Such injury is *damnum injuria*. (*Jacobson v. Van Boening*, 684.)

3. WATERS—RIGHT TO DISCHARGE SURFACE WATER—NEGLIGENCE.—While one may protect his land from surface water, by discharging it upon the land of another, yet, if he is negligent in so doing, and damage results to his neighbor by reason of such negligence, he is answerable therefor. (*Jacobson v. Van Boening*, 684.)

4. WATERS—RIGHT TO DISCHARGE SURFACE WATER—LIMIT OF.—One's right to discharge surface water from his premises does not extend so far as to permit him to collect it in a volume, and, by means of a ditch, to discharge it, contrary to the natural course of drainage, upon the land of another. (*Jacobson v. Van Boening*, 684.)

5. WATERS—INJUNCTION AGAINST DISCHARGE OF SURFACE WATER—WHO ARE ANSWERABLE.—It is no defense to an action to enjoin another from maintaining a certain ditch on the latter's premises, whereby surface water is collected and discharged in a volume on the plaintiff's land, that the injury is in part threatened by the ditches of another. The plaintiff has his remedy against each one contributing to the injury. (*Jacobson v. Van Boening*, 684.)

6. WATERS—INJUNCTION AGAINST DISCHARGE OF SURFACE WATER—FUTURE INJURY.—It is not necessary, in an action to enjoin another from maintaining a certain ditch on the latter's premises, whereby surface water is collected and discharged in a volume upon the plaintiff's land, for the plaintiff to prove that actual injury has already occurred; the remedy is preventive, and may be had upon proof that the act complained of, unless restrained, will result in damage. (*Jacobson v. Van Boening*, 684.)

7. INJUNCTION AS A REMEDY AGAINST DISCHARGE OF SURFACE WATER.—An injunction will lie to restrain a continuing injury to land caused from an unlawful discharge of surface water by an adjoining proprietor. (*Jacobson v. Van Boening*, 684.)

WATERWORKS AND WATER COMPANIES.

See *Municipal Corporations*, 22, 24-27.

WILLS.

1. A WILL TAKES EFFECT as such only on the death of the testator. (*Cheever v. North*, 499.)

2. WILLS, JOINT.—A paper purporting to be the joint will of the two persons executing it as such, and whereby they devise and bequeath property to a third person, cannot, upon the death of one, be proved as the will of both, but may be probated as the will of the decedent. (*In re Davis' Will*, 771.)

3. **WILLS, REVOCATION OF.—THE BURDEN** is upon one who asserts that a later will contained a clause revoking a former one. (Cheever v. North, 499.)

4. **A WILL IS NOT REVOKED BY THE SUBSEQUENT EXECUTION** of another will containing no express clause of revocation, and the destruction of the latter will, therefore, revive the former and leave it in full force. This rule is not destroyed nor modified by a statute declaring that no will shall be revoked unless by burning, tearing, or obliterating the same with intent to revoke it, or by some other will in writing executed by the testator as prescribed by such statute. Such subsequent will, to have the force attributed to it by this statute, must remain unrevoked at the death of the testator. (Cheever v. North, 499.)

5. **WILLS—EVIDENCE.**—If the court holds that certain declarations made by the testator are admissible, provided counsel shall state that they relate to his will, and counsel so states, it is error to exclude such declarations. (Estate of Goldthorp, 400.)

6. **WILL.—CODICIL—EVIDENCE TO PROVE.**—Testimony to the effect that the witness, being in a room with the testator, he showed her a writing, read parts of it, and asked her to make a memorandum of its purport, and told her the names of the executors of his will, and that the papers so exhibited were signed and witnessed, tends to prove that this paper, if testamentary in character, was a codicil to the will in which the persons so spoken of as executors are named as such. (Cheever v. North, 499.)

7. **WILLS, COSTS OF CONTEST OF.**—Under a statute permitting the court in contests of wills to award costs to either party, in its discretion, to be paid by either or out of the estate, as justice and equity shall require, no more than actual taxable costs can be allowed. (Cheever v. North, 499.)

8. **WILLS — CONTEST—WITNESS — COMPETENCY.**—Under a statute providing that no person interested in the event of an action "shall be examined as a witness in regard to any personal transaction or communication between such witness and a person at the commencement of such examination deceased," as against the personal representative or heir of the latter, a contestant of a will is not competent to testify to conversations between himself and the testator concerning the disposition of the latter's property; nor is such witness competent to give an opinion as to the sanity of the testator based on such conversations. He cannot claim to be a witness as to such facts on the ground that it cannot be known, until after the contest is decided, whether he is a legatee or interested party or not. (Estate of Goldthorp, 400.)

9. **WILLS—EVIDENCE OF UNDUE INFLUENCE.**—In a contest of a will, declarations made by the testator, both before and after the execution of the will, as to his feeling toward the contestant, his reasons for not recognizing him in his will, the legatee's influence over him and the disposition to be made of his property, are admissible to show undue influence. (Estate of Goldthorp, 400.)

10. **WILLS — UNDUE INFLUENCE. — OPINION EVIDENCE** is not admissible to show that a testator acted under the control of a legatee in disposing of his property by will. (Estate of Goldthorp, 400.)

11. **WILLS—EVIDENCE OF MENTAL CAPACITY.**—A witness who, in testifying as to the mental capacity of a testator, has stated that the talk of the latter was disconnected, should be allowed to explain in what manner it was disconnected, in order to ascertain if the witness is competent as a nonexpert to give an opinion as to the testator's mental capacity. (Estate of Goldthorp, 400.)

12. WILLS—CONTEST—EVIDENCE OF MENTAL CONDITION OF TESTATOR.—A person who is contesting a will is competent to testify to the mental condition of the testator in so far as his testimony is based upon his observation of the testator, his appearance, conduct, manner, and habits, not connected with personal transactions and communications between them; but, as to an opinion based upon such transactions and communications, he is incompetent to testify. (Estate of Goldthorp, 400.)

13. WILLS—CONTEST—EVIDENCE—DECLARATIONS OF TESTATOR—UNDUE INFLUENCE.—Declarations made by a testator to a legatee, prior to the execution of his will, concerning the disposition to be made of his property, may be testified to by a contestant of the will who took no part in the conversation in which such declarations were made. Such evidence is admissible to show whether the will was procured by undue influence or not. (Estate of Goldthorp, 400.)

14. WILLS—CONTEST—EVIDENCE—DECLARATIONS OF A LEGATEE made prior to the execution of a will, as to the disposition of his property to be made by the testator, are not admissible in evidence on a contest of such will. (Estate of Goldthorp, 400.)

See Courts, 1; Estates, 5, 6; Marriage and Divorce, 1, 2.

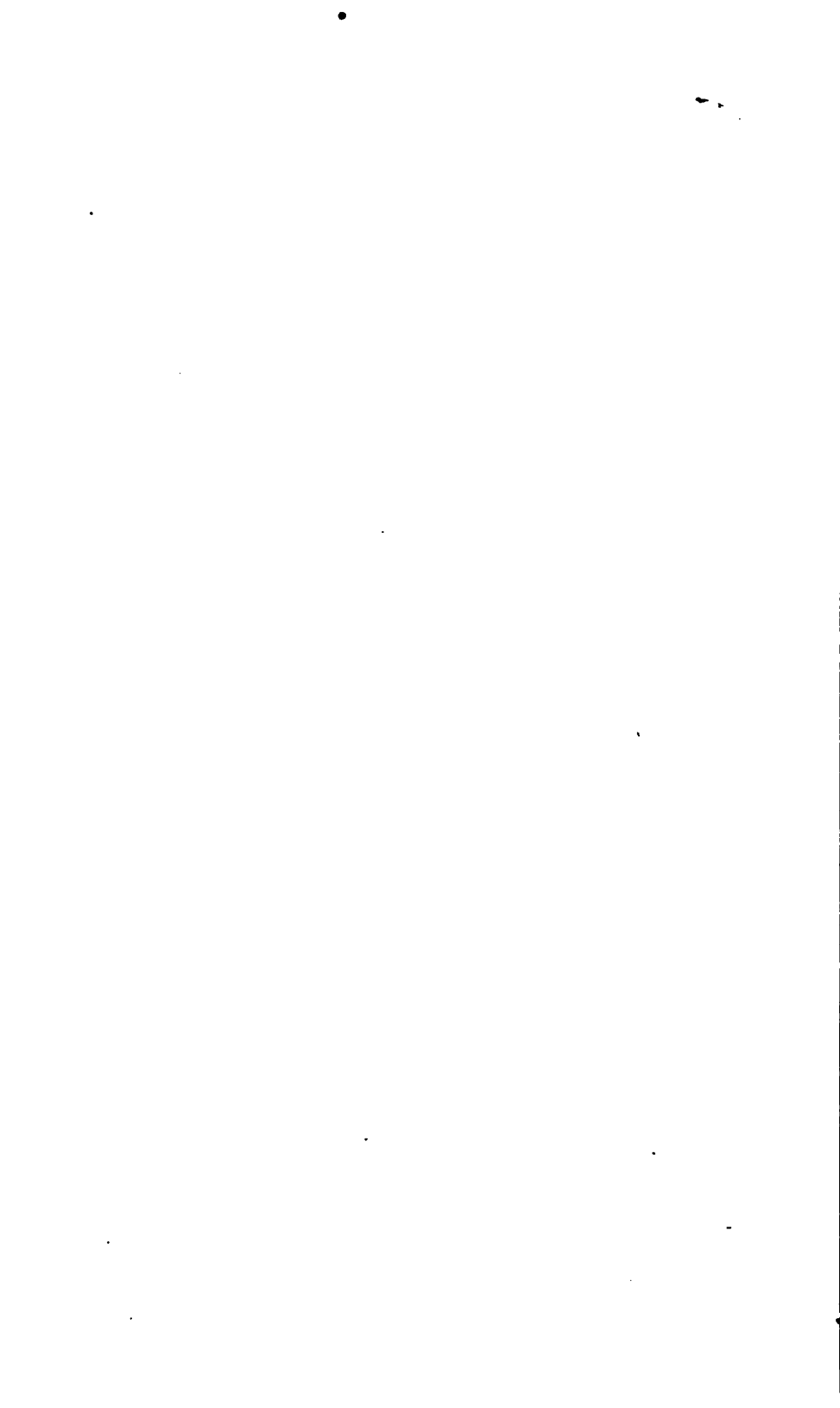
WITNESSES.

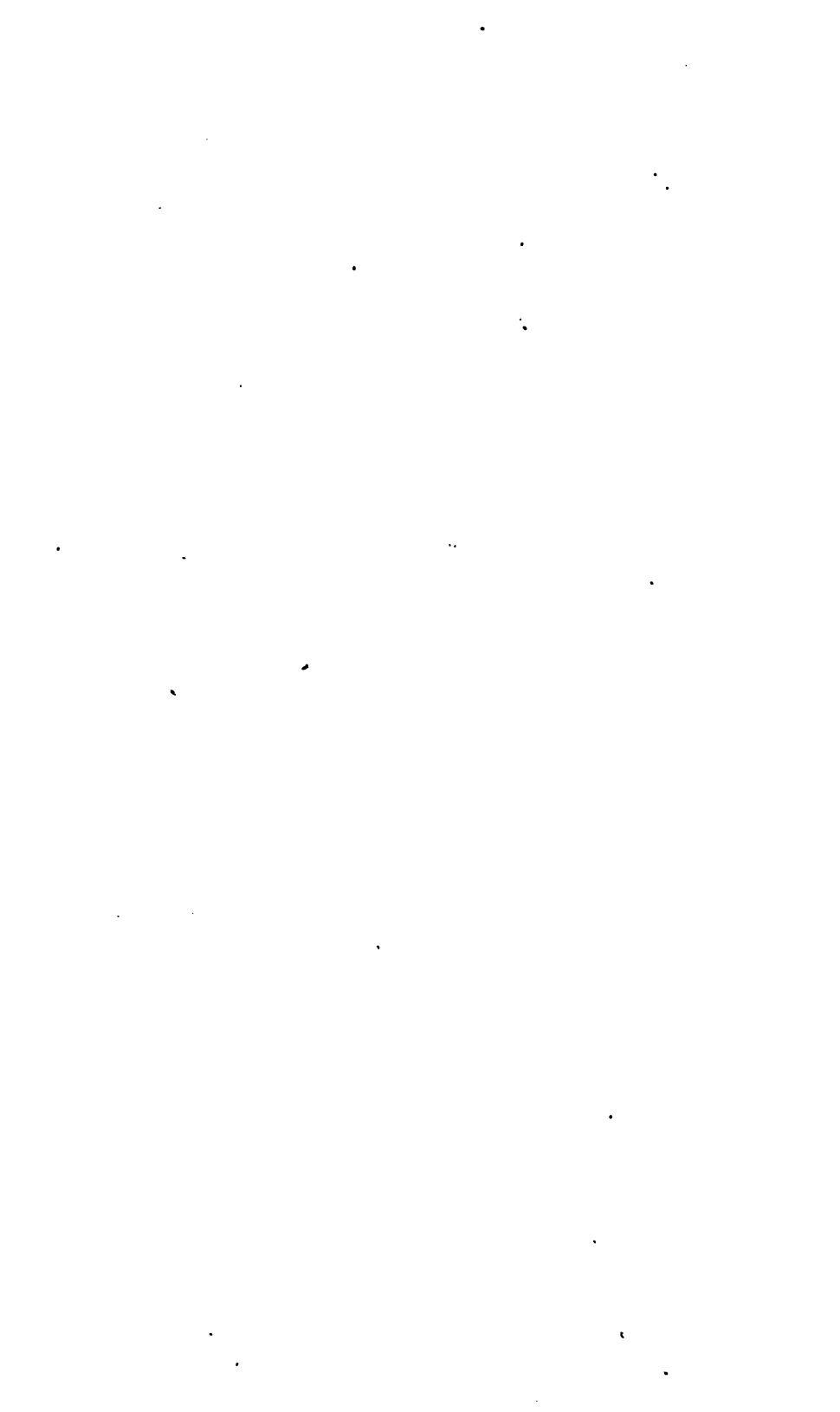
1. WITNESSES—PRIVILEGE FROM SERVICE OF PROCESS. A resident of a sister state, while attending a court of this state as a witness, but not in obedience to any subpoena, cannot be legally served with process for the commencement of a civil action against him; and this immunity depends upon grounds of public policy. (Malloy v. Brewer, 856.)

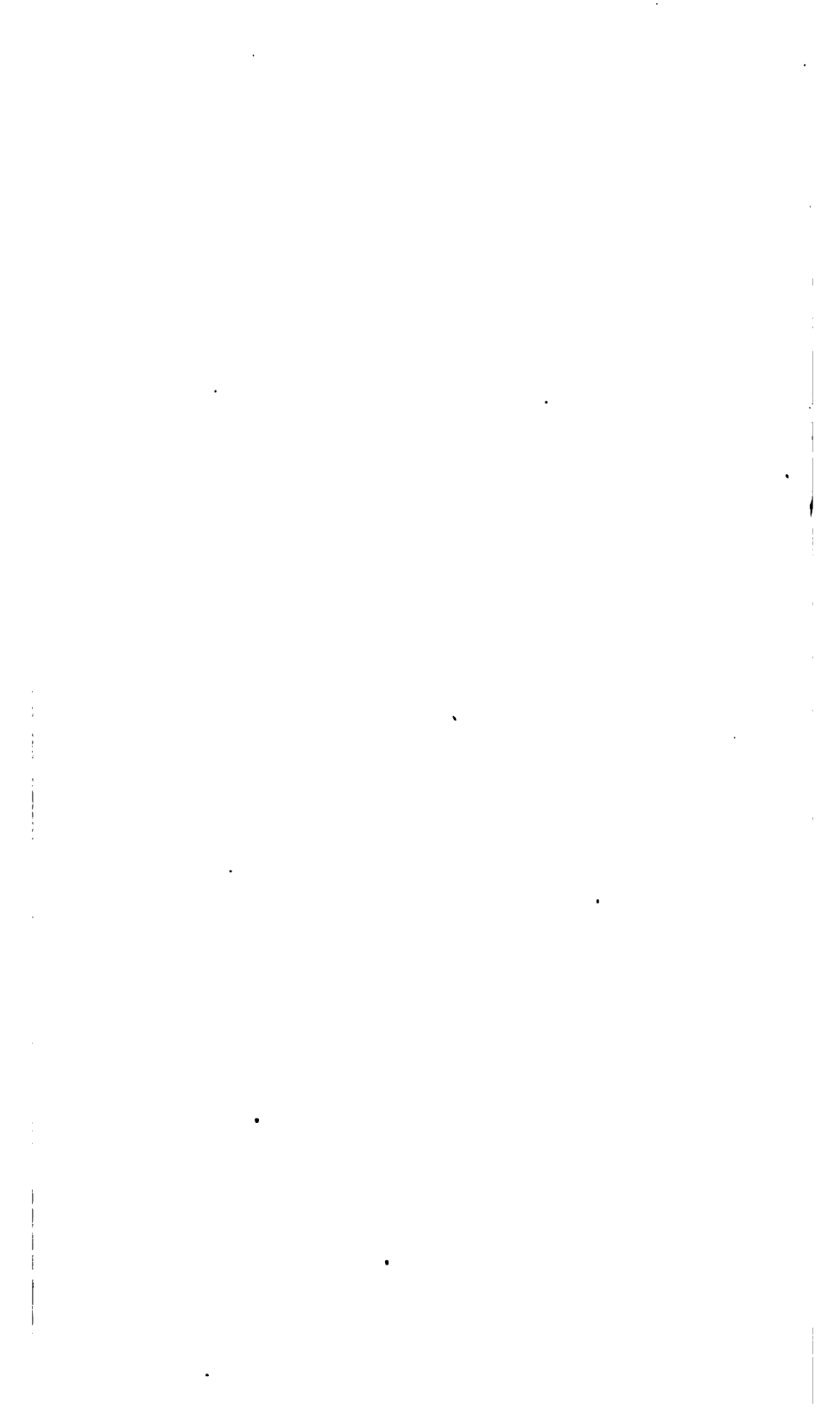
2. WITNESSES—PRIVILEGE FROM SERVICE OF PROCESS—CONSTRUCTION OF STATUTE.—A statute providing that: "A witness shall not be liable to be sued in a county in which he does not reside, by being served with a summons in such county while going, returning, or attending in obedience to a subpoena," does not include, or apply to, witnesses coming into this state from another state. (Malloy v. Brewer, 856.)

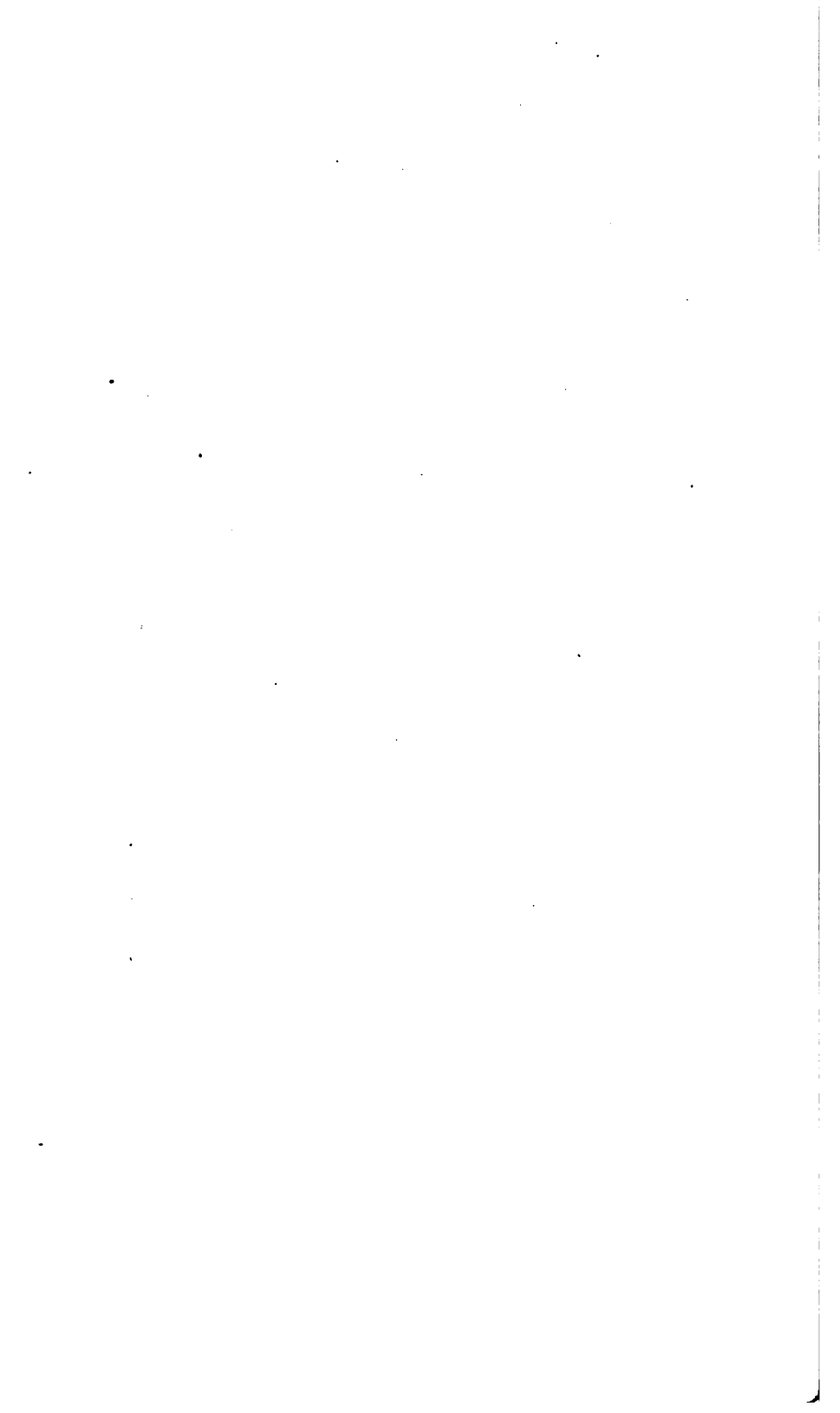
See Wills, 2.

















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